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DECIDED IN THE

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OF THE

STATE OF NEW YORK

**FROM AND INCLUDING DECISIONS OF MAY 8, TO DECISIONS
OF NOVEMBER 20, 1917,**

WITH

NOTES, REFERENCES AND INDEX.

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* Justices of the Supreme Court serving as Associate Judges by designation of the Governor, under section 7 of article VI of the Constitution, as amended in 1899.

† Elected November 6, 1917.

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

COMMENCING MAY 8, 1917.

**EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN,
Plaintiff, v. HORACE E. FRICK COMPANY, Defendant,
PEOPLE'S NATIONAL BANK OF LEBANON, PENNSYLVANIA,
Appellant, and NATIONAL BRIDGE WORKS et al.,
Respondents, Impleaded with Others.**

Statutory construction — part of a statute should not be construed by itself, but in connection with the context, and, if practicable, with the origin and purpose of the statute — mechanics' liens — requirement that assignment of moneys due on a contract should be filed in the proper county clerk's office — what creditors may not invoke such provision.

1. A clause in a statute ought not to be interpreted by itself wholly detached from the statute of which it is a portion. The origin and purpose of the entire statute should be considered, and especially, if they are known and open to consideration, the origin and purpose of the particular provision which is to be construed.

2. Section 15 of the Lien Law relating to mechanics' liens (Cons. Laws, ch. 33), in effect providing that an assignment by a contractor of sums of money due or to grow due upon his contract shall be invalid unless filed in the office of the clerk of the county where the real property is situated, cannot be invoked for the benefit of one having a judgment against the contractor for damages for personal injuries or an attaching creditor of such contractor.

Edison El. Illuminating Co. v. People & Nat. Bank, 158 App. Div. 950; 160 App. Div. 903, reversed.

(Argued March 16, 1917; decided May 8, 1917.)

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Points of counsel.

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 20, 1914, modifying and affirming as modified a judgment entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Walter H. Bond for appellant. The unrecorded assignments of the Horace E. Frick Company to the People's National Bank of moneys due and to become due, are valid as against every one other than lienors under and by virtue of the Lien Law; *a fortiori* as to the respondents who contributed nothing to the creation of the fund in controversy, and whose judgments were obtained long after the giving of the said assignments and the advancing of money thereon. (*McCorkle v. Herrman*, 117 N. Y. 297; *Bates v. Salt Springs Nat. Bank*, 157 N. Y. 32; *Niles v. Mathusa*, 162 N. Y. 546; *Williams v. Ingersoll*, 89 N. Y. 508; *Columbian Bank v. Equitable Assn.*, 61 App. Div. 594; *Van Kannel Revolving Door Co. v. Astor*, 119 App. Div. 214; *White v. Livingston*, 69 App. Div. 369; *Young v. Upson*, 115 Fed. Rep. 192; *MacDonald & Graham v. Kneeland & Luddington*, 5 Minn. 352; *Copeland v. Manton*, 22 Ohio St. 398; Endlich on Interp. of Statutes, §§ 113-127; *Davis v. Davis*, 75 N. Y. 221; *Dean v. M. E. A. Co.*, 119 N. Y. 540, 547; *Henavie v. N. Y. Co.*, 154 N. Y. 278.) Liens of a judgment tort creditor and of an attaching creditor are not contemplated by the Lien Law, and the claims of the respective parties to the fund in question should be adjudicated by the principles of the common law. (*McCorkle v. Herrman*, 117 N. Y. 287; *Mulstein v. City of New York*, 213 N. Y. 308; *Riverside Cont. Co. v. City of New York*, 218 N. Y. 596; *Van Kannel R. D. Co. v. Astor*, 119 App. Div. 214; *Bates v. S. S. Nat. Bank*, 157 N. Y. 323; *Smith v. T. & P. Ry. Co.*, 39 S. W. Rep. 969.)

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Charles D. Miller for John V. Lindberg, respondent. The alleged assignments are invalid as against the defendant Lindberg because not filed pursuant to section 15 of the Lien Law. (*Kane v. Kinney*, 174 N. Y. 69; *Harvey v. Brewer*, 178 N. Y. 7; *Barrett v. Schaefer, Jr., & Co.*, 162 App. Div. 52; *Smith & Co. v. Douglas*, 165 App. Div. 707; *A. P. & C. Co. v. City of New York*, 218 N. Y. 686; *Van Kannel R. D. Co. v. Astor*, 119 App. Div. 214; *Kenyon v. Walsh*, 31 Misc. Rep. 634; *Tooker v. Arnoux*, 76 N. Y. 397; *Weeks v. O'Brien*, 141 N. Y. 199; *Reining v. City of Buffalo*, 102 N. Y. 308.)

John A. Thompson for National Bridge Works, respondent. The assignments from the Frick Company to the bank not having been filed in accordance with section 15 of the Mechanics' Lien Law are invalid and unenforceable, at least as against National Bridge Works, an attaching creditor. (*McCorkle v. Herrman*, 117 N. Y. 297; *Hermann & Grace v. City of New York*, 136 App. Div. 28; *Uvalde A. P. Co. v. City of New York*, 191 N. Y. 244; *Mulstein Co. v. City of New York*, 213 N. Y. 308; *Barrett v. Schaeffer*, 162 App. Div. 52; 217 N. Y. 722.)

HISCOCK, Ch. J. This action was brought by plaintiff for the purpose of procuring a determination of opposing claims to a fund produced under a building contract. While various other issues between the parties to this appeal were litigated upon the trial and are discussed upon this appeal, we are all agreed that after the reversal by the Appellate Division of various findings made by the trial court and upon the new findings made by the former court there only remains for our consideration one question. That question is the one whether section 15 of the law relating to mechanics' liens, in effect providing that an assignment by a contractor of sums of money due or to grow due upon his contract shall be invalid unless filed

in the office of the clerk of the county where the real property is situated, can be invoked for the benefit of one having a judgment against the contractor for damages for personal injuries or an attaching creditor of such contractor. The courts below have held that it may be so invoked. We reach a different conclusion.

The decisive facts, in addition to merely formal ones, which present this question, are as follows:

The defendant Frick Company made a contract with the plaintiff for the construction of certain improvements. Before completion of this contract it became insolvent and defaulted, but after completion of the contract at its expense there remained due to it from the plaintiff on account of said contract the sum of about \$6,000, and which is the fund in dispute. Before any default this company made an agreement with the appellant bank, providing for the advancement to it by the latter of moneys with which to carry on its business, and agreed that from time to time it would assign to the bank moneys due to it upon contracts as security for the payment and satisfaction of said loans. The bank advanced moneys which were wholly or largely used in carrying on the contract here involved, and subsequently and in accordance with its agreement the Frick Company executed to the bank assignments of moneys due under said contract sufficient to exhaust the entire fund now on hand. These assignments were never filed in the office of the county clerk.

The respondent Lindberg was an employee of the Frick Company, and subsequent to the execution of the assignments above referred to he recovered a judgment against it for damages for personal injuries caused by its negligence, on which, after return of execution unsatisfied, supplementary proceedings were instituted.

The respondent National Bridge Works furnished supplies to the Frick Company, which were used to some extent in carrying on the contract already referred to,

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but it took notes for its indebtedness and after the execution of the assignments to appellant it brought action upon these notes and obtained attachments under which it attempted to secure a levy and lien upon the fund already referred to.

The section under which respondents urge that appellant's assignments, because not filed in the clerk's office, were invalid as to them is section 15 of the Lien Law (Cons. Laws, ch. 33), which reads as follows: "No assignment of a contract * * * or of the money, or of any part thereof due or to become due therefor, * * * shall be valid, until * * * such assignment * * * be filed in the office of the county clerk of the county wherein the real property * * * is situated * * *."

Indisputably, the assignments to appellant gave rights to the fund in question which were superior to any acquired by respondents unless such result was prevented by the statute which has been quoted.

Neither of the respondents occupies the position of a laborer or materialman having furnished labor or materials toward the improvement producing the fund, for which any lien on said fund exists under the Lien Law. Lindberg's claim could never have served as the basis for such a lien and while apparently the Bridge Works furnished material for which it might have had a lien, that right has been lost and it occupies the position of an ordinary contract creditor with an attachment. Nevertheless, if the language of the provision in question were to be construed and interpreted simply by itself, it is broad enough to sustain respondents' claim that it protects them, for there is therein no specification or limitation of the persons who may take advantage of it and defeat an assignment as invalid because it has not been filed. But clearly we ought not to thus interpret this clause by itself and wholly detached from the statute of which it is a portion. We ought to consider the origin

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and purpose of the entire statute; and especially we ought to consider (if they are known and open to our consideration) the origin and purpose of the particular provision which we are interpreting. (*People ex rel. Collins v. Spicer*, 99 N. Y. 225, 233; *People ex rel. Earl v. England*, 16 App. Div. 97, 100; *Holy Trinity Church v. U. S.*, 143 U. S. 457, 463.)

There is no doubt about the origin and general purpose of the statute as an entirety. We know from its provisions, from what has been said of its objects in many opinions and from the title of the comprehensive statute, predecessor of the present one, adopted in 1885 (L. 1885, ch. 342), that the act was passed for the protection of laborers and materialmen who had contributed their labor and materials toward the construction of some improvement, and to give them a lien for their pay upon funds which were the fruits of their contributions. Not even these persons acquired liens unless they complied with certain rules in perfecting and enforcing the same, and certainly the general purpose of the statute was not to protect persons who became possessed of claims in tort against the contractor or persons who occupied the position of ordinary contract creditors, no matter how meritorious these classes of claims might be and no matter how much the latter might have contributed to the improvement. And we may go even further in this line of consideration. Although the statute was thus intended to and did afford certain protection to a creditor of the classes specified by giving a lien upon moneys due under the contract, it was entirely possible that he might be, and in fact it often happened that he was, defeated in his attempts to pursue this relief through prior and secret assignments by the contractor of moneys due or to grow due on the contract, and the legislature set out to guard against this particular danger. Commencing as far back as 1896 (L. 1896, ch. 915, § 5), there was a provision which finally developed into the present section 15, which has

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been quoted, intended to prevent this defeat of the meritorious claims generally provided for in the act by a requirement that assignments of moneys due on the contract should be made public by filing them and punishing the failure thus to make them public by a declaration of invalidity. In *Harvey v. Brewer* (178 N. Y. 5, 7) it was said in respect of this section: "This section is supposed to be due to a decision of this court in *Bates v. Salt Springs Natl. Bank* (157 N. Y. 322), holding that in the absence of anything to the contrary in the contract, and before any notice of mechanic's lien is filed, the contractor may assign to his creditor in payment of his debt the whole or any portion of the moneys due or to become due under the contract, and the assignee acquires a preference over a subsequent lienor. * * * That section indicates that the legislature was of the opinion that the protection of the laborers and materialmen made it necessary that notice of an assignment of the contract or the moneys due thereunder or some part thereof, or an order drawn by a contractor upon the owner, ought to be given to those interested, and so it was provided that such an assignment or order should not be valid 'until the contract or a statement containing the substance thereof and such assignment or a copy of each or a copy of such order be filed' in the proper county clerk's office." (*Kane Co. v. Kinney*, 35 Misc. Rep. 1, 5; affd., 174 N. Y. 69; *Brace v. City of Gloversville*, 167 N. Y. 452, 456; *Armstrong v. Chisolm*, 99 App. Div. 465, 469; *Van Kannel R. Door Co. v. Astor*, 119 App. Div. 214.)

It thus appears that the legislature adopted a statute for the protection of certain classes of creditors, which do not include the respondents, and that they inserted therein the special provision under consideration for the purpose of filling a gap in the statute and for the purpose of preventing the defeat of the beneficial purposes secured by other provisions of the statute through certain definite evils. It recognized that it was useless to give to a

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laborer or materialman the right to file a lien upon a fund if the contractor could defeat all practical benefits of this right by making a secret assignment of the fund, and hence the requirement that such assignments should be filed. During all of this process it is beyond dispute that the general purpose of the legislative mind was to protect certain classes and that this particular clause was passed to make such protection more perfect. Keeping this in mind and construing the language of section 15 in the light of the general purpose of the statute, it seems to us evident that the language rendering assignments invalid is to be limited by the purpose for which the provision was adopted and that it should be held to relate simply to the people contemplated by the statute and should not be held to apply for the benefit of those, like the present respondents, who were not in the mind of the legislature at all.

We think that this view is sustained by the following authorities: *Matter of Meyer* (209 N. Y. 386); *Holy Trinity Church v. U. S.* (*supra*); *Lake Shore & M. S. R. Co. v. Roach* (80 N. Y. 339, 344); *Delafield v. Brady* (108 N. Y. 524, 529); *Riggs v. Palmer* (115 id. 506, 509, 510).

In the *Holy Trinity Church* case it was contended that a statute made a certain act a misdemeanor, and it was said: "The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms for the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and, therefore, cannot be within the statute." (p. 472.)

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The judgments of the Special Term and Appellate Division should be reversed in so far as the same dismiss appellant's claim against the fund herein and direct payment therefrom of the respective claims of the respondents, and also in so far as they award judgment in favor of said respondents respectively and against appellant for the sum of \$79.06 and \$269.36 for expenses of the reference.

Judgment is further granted that appellant's claims herein be paid from the balance of said fund now on hand in priority to respondents' claims, and that appellant have costs in this court against said respondents, which in addition shall include the taxation against each respondent of one-third of the disbursements incurred in printing the record on appeal in the Appellate Division.

McLAUGHLIN, J. (dissenting). I had occasion to consider the effect of section 15 of article 2 of chapter 38, Laws of 1909, in *Williams Engineering & Contracting Co. v. City of New York* (175 App. Div. 571). Subsequent investigation has led me to the conclusion that the construction there put upon the section is the correct one. Chapter 38 of the Laws of 1909 is entitled "An Act in relation to liens, constituting chapter 33 of the Consolidated Laws." The act contains all the provisions of the laws then existing relating to liens on personal property except those relating to conditional sales of goods which were transferred to the Personal Property Law. The first article is devoted to definitions, the second to mechanics' liens, and the remaining articles to other liens and the enforcement of the same.

Section 15 comes in article 2 relating to mechanics' liens. It provides that "no assignment of a contract * * * or of the money or any part thereof due or to become due therefor, * * * shall be valid, until * * * such assignment * * * be filed in the office of the county clerk of the county wherein the real prop-

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erty * * * is situated, * * * and such contract, assignment or order shall have effect and be enforceable from the time of such filing." From the language thus used it is difficult to imagine how the purpose of the legislature in enacting the section can be misunderstood. The words "no assignment" are so comprehensive and so clear and unambiguous as to include *every* assignment unless words not expressed in the statute are read into it. But it is suggested that notwithstanding the fact that the language used, if taken literally, includes all assignments, nevertheless that is not what the legislature intended; that its intent was to protect a certain class of creditors to the exclusion of others.

In ascertaining what the legislature intended by the enactment, the words used must be taken in their ordinary and usual meaning, and if a doubt arises as to the sense in which they are used, then such doubt must be solved, if possible, by a reference to the context (*Bristol v. Smith*, 158 N. Y. 157), and it is only in case the intent cannot be ascertained in this way that resort may be had to the occasion of the enactment and to the policy which prompted it. (*Palmer v. Van Santvoord*, 153 N. Y. 612.) This statute, if the ordinary meaning be accorded to the words used, is plain, and there is no necessity to resort either to the general context of the whole article or to the occasion or policy which prompted the enactment. The evident purpose was to provide against secret transfers of an interest in a contract or the money due or to grow due under it, and a method to carry out and make effective this purpose is provided.

Every assignment, no matter for what purpose given, in order to be valid *must be filed* in a public office to the end that any one may ascertain just what the interests are and by whom held. The protection of a particular class of lienors was not, in my opinion, the main purpose of the enactment. It was only incidental. The main purpose was publicity, and no one, no matter who, could

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be injured if it be enforced according to its letter and spirit. Any one who takes an assignment, if he complies with the section, is fully protected. If he does not comply with it, then he takes no interest because the assignment cannot be enforced. Title to the subject-matter of the assignment remains in the assignor, and as such may be reached by a diligent creditor.

It may be that in some cases this would work a hardship. That is the case with the enforcement of nearly every statute, but in the long run a nearer approach to justice will be reached by giving to the words used their ordinary, normal and natural meaning rather than by inserting or substituting others in order to carry out what one may conjecture the legislature intended.

The construction for which I contend does not require reading anything into the statute, and for the obvious reason that it is perfectly plain upon its face. If a change be desired, then it should be done by legislative enactment and not by judicial fiat. The legislature can change the section if it sees fit to do so, but until it does the court will have performed its full duty by enforcing it according to the language used instead of giving a different effect by reading into the statute words not there to be found.

The view for which I contend is sustained by Snyder's Lien Law of New York (6th ed.), p. 234; Jensen's Mechanic's Lien Law of New York, p. 101; *Barrett v. Schaefer, Jr., & Co.* (162 App. Div. 52; affd., 217 N. Y. 722); *Van Kannel R. D. Co. v. Astor* (119 App. Div. 214, 217), and *Harvey v. Brewer* (178 N. Y. 5, 7). In the latter case this court said: "So, if what was done here was in effect either an absolute or equitable assignment of so much of the fund as the order named, it would come within the condemnation of section 15 of the Lien Law (*supra*). That section indicates that the legislature was of the opinion that the protection of the laborers and materialmen made it necessary that notice of an assign-

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ment of a contract or the money due thereunder or some part thereof, or an order drawn by a contractor upon the owner, ought to be given to those interested, and so it provided that such an assignment or order should not be valid 'until the contract or a statement containing the substance thereof and such assignment or a copy of each or a copy of such order be filed' in the proper county clerk's office."

The assignments in the present case from the Frick Company to the appellant bank never were filed in the office of the county clerk where the real property which was being improved was situate, and for that reason, as I read the statute, the same are invalid and unenforceable.

I am, therefore, unable to concur in the prevailing opinion in so far as it holds that such assignments are valid, and to that extent I dissent from the decision about to be made.

COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur with HISCOCK, Ch. J.; McLAUGHLIN, J., reads dissenting opinion.

Judgments reversed, etc.

SAMUEL NILSEN, Respondent, *v.* AMERICAN BRIDGE COMPANY, Appellant.

Master and servant — negligence — pleading — demurrer — common-law action for negligence — when cause of action therein not barred by Workmen's Compensation Law.

Where, in an action brought by the plaintiff to recover from the defendant, a corporation, damages for injuries received when plaintiff was engaged in his duties as an employee, the complaint alleges a cause of action for negligence at common law and does not allege or disclose that plaintiff, or his employer, was engaged in any hazardous occupation within, or subject to, the provisions of the Workmen's Compensation Law (Cons. Laws, ch. 67), the question as to whether the plaintiff, by reason of said law, is barred from the right

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to recover is not presented, and a demurrer to the complaint cannot be sustained upon the ground that the remedy provided in the Compensation Law is exclusive.

Nilsen v. American Bridge Co., 176 App. Div. 915, affirmed.

(Argued April 16, 1917; decided May 8, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 19, 1917, which affirmed an order of Special Term granting a motion by plaintiff for judgment on the pleadings.

The following question was certified: "Is the plaintiff, respondent herein, entitled to judgment upon the pleadings?"

The nature of the action and the facts, so far as material, are stated in the opinion.

William W. Corlett and *Raynal C. Bolling* for appellant.

Benjamin Patterson and *George Bell* for respondent.

HOGAN, J. The complaint in this action alleged in substance that defendant is a domestic corporation; that on February 15th, 1916, plaintiff while in the employ of defendant and engaged in work under its direction, without negligence on his part, and by reason of the negligence of defendant, received injury to his person, the nature of which is detailed in the complaint; that by reason of such injuries, which are stated to be permanent, he suffered pain for a long period of time, though he was not incapacitated for more than two weeks from earning full wages at his customary employment. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and plaintiff's motion for judgment on the pleadings granted. From such judgment

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appeal was taken to the Appellate Division, where the judgment was affirmed.

Upon argument of the appeal in this court counsel for defendant appellant urged that by the enactment of the Workmen's Compensation Act plaintiff is barred from any right to recover damages for his injuries in a common-law action for the reason that the remedy provided for in the Compensation Law is exclusive.

That the complaint sufficiently alleges a cause of action for negligence at common law is practically conceded by appellant. The complaint does not allege that plaintiff was engaged as an employee in a hazardous employment at the time the injury was sustained. While the complaint alleges the corporate existence of defendant it does not disclose that such corporation defendant was engaged in any hazardous work or occupation described in the Workmen's Compensation Law, and it fails to allege the nature of the business carried on by the defendant or that it was engaged in business as a manufacturing corporation. The complaint does not disclose that plaintiff and plaintiff's employer, the defendant, are subject to any provisions of the Compensation Law. Consequently, the question as to whether or not the plaintiff, by reason of the Compensation Law, is barred from a right to recover is not presented upon the pleadings before us.

The order of the Appellate Division should be affirmed, with costs, and the question certified answered in the affirmative.

HISCOCK, Ch. J., CHASE, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Order affirmed.

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In the Matter of the Transfer Tax upon the Estate of
ST. CLAIR MCKELWAY, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appel-
lant; VIRGINIA B. MCKELWAY, Respondent.

Transfer tax — personal property owned by husband and wife as joint tenants — upon death of husband his undivided half interest therein passes to his wife and is subject to a transfer tax as if it had been bequeathed by will — the undivided half interest of the wife not taxable.

1. There is a joint ownership of personal property analogous to an estate in lands, but husband and wife do not take personal property as tenants by the entirety.

2. Where a husband and wife owned jointly certain securities which they delivered to a trust company to hold as custodian, pay them the income in *equal shares*, and, if the agreement should be in force at the death of either, to deliver and pay over the securities and any income thereon then on hand to the survivor, they owned the securities as joint tenants but not by the entirety.

3. Subsequent to the deposit of such securities and before the husband's death section 2204 of the Tax Law was amended (L. 1915, ch. 664) by providing that whenever intangible property is held in the joint names of two or more persons as joint tenants and payable to either or to the survivor upon the death of one of such persons, the right of the survivor to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant and had been bequeathed to the survivor by will. For the purposes of taxation the wife is deemed to have acquired the husband's interest in the joint property by his death and is taxable under this statute. As to the one-half the wife owned, she gained nothing by the death of the husband except the elimination of his interest and such one-half is not taxable. (*Matter of Pell*, 171 N. Y. 48, followed.)

Matter of McKelway, 176 App. Div. 929, reversed.

(Argued April 16, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

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January 5, 1917, which affirmed an order of the Kings County Surrogate's Court assessing a transfer tax upon the estate of St. Clair McKelway, deceased.

The facts, so far as material, are stated in the opinion.

Marcus B. Campbell for appellant. A taxable transfer was made on the death of the decedent, as to the property described in the 7th and 8th paragraphs of the appraiser's report. (L. 1915, ch. 664; *Matter of Schroeder*, N. Y. L. J., March 20, 1912; *Matter of Wunsch*, N. Y. L. J., Jan. 24, 1913; *Matter of Von Bermuth*, N. Y. L. J., March 1, 1913; *Matter of Stebbins*, 52 Misc. Rep. 538; *Matter of Spring*, 75 Misc. Rep. 586; *Matter of Pitou*, 79 Misc. Rep. 384; *Kelly v. Burns*, 194 N. Y. 49; *Matter of Thompson*, 167 N. Y. 356; 215 N. Y. 702; *Matter of Tilley*, 166 App. Div. 240; *Matter of Pell*, 171 N. Y. 48.)

Edgar M. Cullen and *Francis L. Archer* for respondent. No tax can be legally imposed against Mrs. McKelway under chapter 664 of the Laws of 1915. (*Matter of Euston*, 113 N. Y. 174; *Matter of Vassar*, 127 N. Y. 1; *Matter of Vanderbilt*, 172 N. Y. 69; *People ex rel. Hatch v. Riordan*, 184 N. Y. 431; 204 U. S. 152; *Matter of Keeney*, 194 N. Y. 281; 222 U. S. 525; *Bergmann v. Lord*, 194 N. Y. 70; *Matter of Pell*, 171 N. Y. 48; *Matter of Lansing*, 182 N. Y. 238; *Matter of Slosson*, 216 N. Y. 79; *Matter of King*, 217 N. Y. 358.) The death of one joint tenant does not change the interest of the surviving joint tenant, but merely extinguishes the interest of the former in the property. The power to revoke the trust agreement reserved by the parties did not authorize either of them to vary their respective interests in the property, but merely to discharge the trust company as custodian. (1 Washb. on Real Prop. 470, § 14; *Matter of Lansing*, 182 N. Y. 238; *Matter of Hoffman*, 161 App. Div. 836; 212 N. Y. 604.)

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POUND, J. On November 24, 1913, St. Clair McKelway and Virginia B. McKelway, his wife, owned jointly certain securities consisting of corporate bonds, which they delivered to the Brooklyn Trust Company to hold as custodian, pay them the income *in equal shares*, and, should the agreement be in force at the death of either, to deliver and pay over the securities and any income thereon then on hand to the survivor.

At the time this agreement was entered into the interest in property which upon the death of one joint tenant passes by right of survivorship to his co-tenant was not in express terms subject to taxation and it has been held that in such cases the survivor takes, not under the laws regulating intestate succession, but under the conveyance or instrument by which the tenancy is created. (*Matter of Klatzl*, 216 N. Y. 83; *Atty.-Gen. v. Clark*, 222 Mass. 291.) Thereafter and before the death of Mr. McKelway additions were made to the joint property and then section 220 of the Tax Law (Cons. Laws, ch. 60) was amended by chapter 664 of the Laws of 1915, by the addition thereto of subdivision 7 which reads as follows:

"Whenever intangible property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons,

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by such deceased tenant by the entirety, joint tenant or joint depositor by will."

Mr. McKelway died on July 16, 1915, leaving a last will and testament by which he gave his wife all his property and named her executrix thereof. The will was duly admitted to probate. The transfer tax appraiser found that the joint property was taxable as though it had passed by the will. The surrogate relieved the joint property from taxation, holding that the only transfer thereof was consummated in the lifetime of the testator and that it was not taxable for the reason that where there is no transfer there is no tax, and a transfer made before the passage of the amendment was not affected by it. (*Matter of Lansing*, 182 N. Y. 238.) The Appellate Division affirmed the order of the surrogate by a divided court and the question for us to answer is whether the state may, by the express terms of a statute, impose a tax upon the joint property in which the deceased had an interest ceasing on his death to the extent to which a benefit accrues or arises to the survivor by the cesser of such interest, or whether the entire right of succession accrued prior to the amendment and no interest became vested in the survivor by reason of his death.

It has been said that this kind of ownership is "an object of disfavor" (*Overheiser v. Lackey*, 207 N. Y. 229, 233); on the other hand the tax laws are to be construed strictly. But the jurisdiction of the state to regulate and control the transmission of the property of the dead to the living is an attribute of sovereignty, far reaching, if not unlimited, in its possible extent over the privilege taxed. (*U. S. v. Perkins*, 163 U. S. 625.)

Mr. and Mrs. McKelway owned this personal property as joint tenants but not by the entirety. There is a joint ownership of personal property analogous to a joint estate in lands (*Overheiser v. Lackey*, 207 N. Y. 229, 236), but husband and wife do not take personal property as tenants by the entirety. (*Matter of Albrecht*, 136 N. Y.

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91, 94.) Joint tenants, by reason of the combination of entirety of interest with the power of transferring in equal shares, are said to be seized *per my et per tout*, or by the half *and* the whole, but tenants by the entirety are seized *per tout et non per my*, and the conveyance by either husband or wife will have no effect against the other if survivor. (*Hiles v. Fisher*, 144 N. Y. 306.) Upon the vesting of an estate by the entirety, both tenants become seized of the whole estate and upon the death of one the survivor acquires no new or additional interest by survivorship. (*Matter of Klatzl, supra*.) But joint ownership in personal property may be severed by the act of one in disposing of his interest. If the interest of one joint owner passes to a third party he and the other joint tenant become tenants in common. The doctrine of survivorship applies only if the jointure is not severed. (Williams on Personal Property, pp. 302-306.) The undivided half of this joint property which Mr. McKelway might have effectually disposed of at any time during his life never passed into the absolute ownership of his wife until her husband's death. A transfer tax thereon does not diminish the value of a vested estate and is free from the objections to a tax on vested remainders and reversions as set forth in *Matter of Pell* (171 N. Y. 48) or to a tax on contingent remainders as set forth in *Matter of Lansing (supra)*.

As to the one-half which Mrs. McKelway herself owned and had the right to dispose of, the rule of the *Pell* case must govern. She gained nothing in regard thereto by the death of her husband except as the *jus accrescendi* eliminated his interest. The right of the survivor of two joint tenants of personal property to the exclusive ownership thereof may be deemed a taxable transfer of one-half of the joint property but not to the whole. It is taxable only to the extent of the beneficial interest arising by survivorship, which is, as we have seen, the accruer by survivorship of the whole instead of

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the half. To this extent it was a property right fully acquired only on survivorship, analogous to an interest created by a power of appointment under a will executed prior to the enactment of the law taxing transfers, and, therefore, one that could be cut down by the imposition of an excise tax after the joint ownership began. (*Matter of Vanderbilt*, 50 App. Div. 246; 163 N. Y. 597.) The imposition of such a tax violates no contract for neither joint tenant agrees not to terminate the joint tenancy. Mrs. McKelway had no contract with her husband as to the joint property which was not as ambulatory as a will to the last moment of Mr. McKelway's life and, for the purposes of taxation, she is deemed to have acquired his interest in the joint property by his death.

The order of the Appellate Division should be reversed, with costs in this court and Appellate Division, and the proceeding remitted to the Surrogate's Court for the purpose of imposing a tax in accordance with this opinion.

HISCOCK, Ch. J., CHASE, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Order reversed, etc.

In the Matter of the Claim of MARY G. FOGARTY against
NATIONAL BISCUIT COMPANY et al., Respondents.

STATE INDUSTRIAL COMMISSION, Appellant.

Workmen's Compensation Law—death of night watchman employed by corporation engaged in hazardous occupation—when widow of deceased watchman entitled to compensation although there is no evidence showing how death of watchman was caused.

1. A night watchman employed by a corporation engaged in a business designated as "hazardous" under the Workmen's Compensation Law (Cons. Laws, ch. 67, § 2, group 34) to patrol its buildings at night, is within the law, and where the body of such

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watchman, who had begun his duties for the night, was found, about midnight, at the bottom of the well under the staircase in one of the buildings, his widow is entitled to compensation and the award of the state industrial commission should be sustained.

2. Under the provisions of the Compensation Law (§§ 21, 68), relating to rules of evidence and presumptions, and the liberal construction which has been placed thereon by this court for the purposes of carrying into effect the intention of the legislature, there was evidence in the record presented to the commission sufficient to justify the findings made by the commission.

Matter of Fogarty v. Nat. Biscuit Co., 175 App. Div. 729, reversed.

(Argued April 19, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 22, 1916, reversing an award of the state industrial commission made under the Workmen's Compensation Law and dismissing the claim of the petitioner.

Egburt E. Woodbury, Attorney-General (E. C. Aiken of counsel), for appellant. The occupation of the claimant's intestate was a hazardous occupation specified in the Workmen's Compensation Act. (*Larsen v. Paine Drug Co.*, 218 N. Y. 252; *Sorge v. Aldebaran Co.*, 218 N. Y. 636; *White v. N. Y. C. R. R. Co.*, 216 N. Y. 653; *Walther v. American Paper Co.*, 98 Atl. Rep. 264; *Western Metal Supply Co. v. Pillsbury*, 156 Pac. Rep. 496; *Western G. S. P. Co. v. Pillsbury*, 159 Pac. Rep. 423; *Matter of Sundine*, 218 Mass. 1; *Bloevlt v. Sawyer*, 6 B. W. C. C. 16; *Carinduff v. Gilmore*, 7 B. W. C. C. 981; *North Carolina R. Co. v. Zachary*, 232 U. S. 248.) The death of the claimant's intestate was the result of an accident arising out of and in the course of his employment. (Cons. Laws, ch. 67, § 21.)

Bertrand L. Pettigrew and Walter L. Glenney for respondents. The occupation of the claimant's intestate was not a dangerous one covered by the Workmen's Com-

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pensation Law. (*Newman v. Newman*, 218 N. Y. 325; *Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410; *Matter of Gleisner v. Gross & Herbener*, 170 App. Div. 37; *Stickles v. Ballston R. S. Co.*, 171 App. Div. 108; *Mandle v. Steinhardt & Bro.*, 173 App. Div. 515; *Aylesworth v. Phoenix Cheese Co.*, 170 App. Div. 54; *Lyon v. Windsor*, 159 N. Y. Supp. 162.) The award is not sustained by testimony establishing that the death of the claimant's intestate was the result of an accident arising out of and in the course of his employment. (*Collins v. B. U. Gas Co.*, 171 App. Div. 381.)

HOGAN, J. The defendant National Biscuit Company is engaged in the bakery business, designated as "hazardous" under the Workmen's Compensation Law (L. 1914, ch. 41; Cons. Laws, ch. 67), section 2, group 34.

William Fogarty was employed by the biscuit company as a night watchman. As such his principal duty was to patrol the buildings every hour, passing through every department and ring up the clocks, thirty-five in number.

October 2d, 1915, soon after midnight, the body of Mr. Fogarty was found at the bottom of the well under the stairway in one of the buildings of the company. Application was thereafter made by his widow to the industrial commission for compensation under the Workmen's Compensation Law, and after a hearing had the commission made an award. Upon appeal therefrom by the company and insurance carrier, the Appellate Division, by a divided court, held in effect "The position of night watchman is not a hazardous employment and performing the duties of that position, Fogarty was not exposed to the dangers of the bakery business which is a hazardous occupation," reversed the award and dismissed the claim. This court has given a more liberal construction to the Compensation Law, and held that "where * * * an employee is injured while performing an act

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which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed." (*Matter of Larsen v. Paine Drug Co.*, 218 N. Y. 252, 256.) The principle has been extended to cover injuries to night watchmen. (*Matter of White v. N. Y. C. & H. R. R. Co.*, 216 N. Y. 653; affirmed in United States Supreme Court, 243 U. S. 188; *Matter of Sorge v. Aldebaran Company*, 218 N. Y. 636.) The deceased was, therefore, within the Compensation Law.

Counsel for respondent urges that the award made was not sustained by testimony establishing that the death of Mr. Fogarty was the result of an accident arising out of and in the course of his employment; that there were no eye-witnesses to the accident and the stairs and handrail thereon were intact; that the deceased might have had an attack of vertigo and fallen downstairs or he might have died from heart disease.

In cases before the industrial commission the standard prevailing in negligence actions is not to be applied. As was stated in *Matter of Petrie* (215 N. Y. 335, 338): "The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of

what was regarded by the legislature as a wise public policy concerning injured employees."

In connection with the language above quoted certain provisions of the Compensation Law are material.

Section 68 provides: "Technical rules of evidence or procedure not required.—The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties."

Section 21 provides: "Presumptions.—In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary: 1. That the claim comes within the provisions of this chapter; 2. That sufficient notice thereof was given; 3. That the injury was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another; 4. That the injury did not result solely from the intoxication of the injured employee while on duty."

In the *Sorge* case, as in the case at bar, there were no eye witnesses to the accident. The body of Mr. Fogarty was found at the bottom of a well under a stairway. *Sorge* was found unconscious in the cellar of a building, or, as his declarations testified to indicated, he had fallen upon a sidewalk.

The record in the *Sorge* case was made up of the formal proof of death by the widow, the first report of injury by the employer, proof of death by the employer and the form entitled "Proof of death by Eye-witness" together with the coroner's inquisition, and some evidence attached to the same, and the evidence of a hospital physician, all of which tended clearly to show more or less speculation as to the manner in which *Sorge* was injured and some

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conflict as to the cause of his death, together with declarations made by him in his conscious moments as to the manner in which he fell. In the case at bar the record consists of the same form of notices by the employer, the first notice, the second notice, the verified report made by the manager of the company, the evidence of the superintendent of the company. The claimant appeared before the commission and was inquired of with reference to the nature of the work performed by her husband, etc. She also stated what she had heard of the manner in which her husband was injured. The proofs in the case under consideration were fully as favorable to the claimant as the proofs in the *Sorge* case, which was affirmed by this court. The hearsay statement of the claimant was not broader than a like statement in the *Sorge* case, and is not affected by the case of *Matter of Carroll v. Knickerbocker Ice Co.* (218 N. Y. 435), especially as no substantial evidence was offered in this case to overcome the presumption of fact that the death of Mr. Fogarty was the result of an accident.

It is unnecessary to call attention to the liberal rule prevailing in negligence actions where a recovery is sought when death has resulted and eye-witnesses to the accident cannot be produced. Under the liberal construction which has been placed upon the Compensation Law by this court for the purpose of carrying into effect the intention of the legislature in the enactment of said law, we conclude that there was evidence in the record presented to the commission sufficient to justify the findings made by the commission.

The order of the Appellate Division reversing the award made and dismissing the claim should be reversed, with costs to the state industrial commission in the Appellate Division and this court, and award affirmed.

CHASE, CARDOZO, POUND and ANDREWS, JJ., concur; HISCOCK, Ch. J., and McLAUGHLIN, J., dissent.

Order reversed, etc.

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In the Matter of the Claim of ARTHUR SCHMIDT, Respondent, against CLARA BERGER et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Workmen's Compensation Law — superintendent of apartment house injured by fall from stepladder while making ordinary repairs not entitled to compensation.

The claimant was employed as a superintendent of an apartment house and incidental to that employment he made ordinary repairs on such building. While mounted on a stepladder engaged in cutting away a part of a door to prevent "binding," he fell and broke his arm. Held, that he was not engaged in a hazardous employment carried on by his employer for pecuniary gain, within the meaning of the Workmen's Compensation Law, at the time he was injured, and that the work that he was engaged in at the time of the accident was neither "structural carpentry" or "construction, repair and demolition of buildings," as enumerated in group 42 of section 2 thereof. (Cons. Laws, ch. 67.)

Matter of Schmidt v. Berger, 175 App. Div. 957, reversed.

(Argued April 19, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1916, affirming an award of the State Industrial Commission made under the Workmen's Compensation Law.

The facts, so far as material, are stated in the opinion.

John N. Carlisle and *Alfred W. Andrews* for appellants. Claimant was not an employee engaged in an employment specified as hazardous at the time of injury. (*Matter of Sheridan v. Groll Const. Co.*, 218 N. Y. 633; *Matter of Chappelle v. 412 Broadway*, 218 N. Y. 632; *Hertz v. Ruppert*, 218 N. Y. 148; *Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410; *Glatzl v. Stumpp*, 220 N. Y. 71; *Newman v. Newman*, 218 N. Y. 325.) In any event the claimant was not engaged in a hazardous employment carried on by the employer for pecuniary

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gain. (*Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410; *Matter of Grifenhagen v. Ordway*, 218 N. Y. 458; *Abey v. Roberts Co.*, 175 App. Div. 1.)

Egburt E. Woodbury, Attorney-General (*E. C. Aiken* of counsel), for respondent. Claimant was an employee engaged in a hazardous employment enumerated in group 42 of the Workmen's Compensation Law. (*Glatzl v. Stumpf*, 220 N. Y. 71; *Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410.)

CHASE, J. The appellant Berger is the owner of an apartment house at 108-10 West One Hundred and Eleventh street, New York city. The claimant was employed by her as a superintendent of the building and incidental to that employment he made ordinary repairs on such building. While so employed he found that a basement door "bound at the top" and did not open or shut freely. He mounted a stepladder and while standing thereon commenced with a carpenter's tool called a "plane" to cut away a part of the door and thus prevent such binding, and while so engaged fell off the stepladder and broke his arm. The industrial commission gave him an award and the Appellate Division of the Supreme Court has affirmed the same, although two of the justices did not concur in the decision.

The employment of claimant is conceded, and it is also conceded that the injury was accidental, and arose out of and in the course of his employment. He was not, however, engaged in a hazardous employment within the meaning of the Workmen's Compensation Law, carried on by the defendant Berger for pecuniary gain, at least he was not so employed at the time he was injured. (*Matter of Sheridan v. Groll Construction Co.*, 218 N. Y. 633.)

It is urged in behalf of the claimant that he was engaged in a hazardous employment enumerated in

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group 42 of section 2 of the Workmen's Compensation Law. If so, the work that he was engaged in at the time of the accident must be included in the words "structural carpentry" or "construction, repair and demolition of buildings." The words quoted when read and construed in connection with the other parts of said group 42 do not include the work being done by the claimant as stated.

The words "structural carpentry" must be construed together and cannot be separated. They do not include an isolated act in planing wood. (See *Matter of Heitz v. Ruppert*, 218 N. Y. 148, 151.) Neither was the act of the claimant in planing the top of the door included within the words "construction, repair and demolition of buildings." (*Matter of Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410, 413.)

The order of the Appellate Division should be reversed and the claim dismissed, with costs in this court and in the Appellate Division to the appellants against the state industrial commission.

HISCOCK, Ch. J., HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur.

Order reversed, etc.

In the Matter of the Claim of S. W. BOWNE, Respondent,
against S. W. BOWNE COMPANY et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Workmen's Compensation Law — the president and principal executive officer of a corporation, engaged in a hazardous occupation, not an "employee" entitled, under the statute, to compensation for injuries received while assisting other employees in performing manual labor.

1. The intention of the lawgiver is to be sought first in the words of a statute, and, if they are obscure, in the occasion of the enactment and in the policy which dictated it, when that can legitimately be ascertained.

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2. The words of section 3 of the Workmen's Compensation Law (Cons. Laws, ch. 67) defining "employer" and "employee" are not clear, but, construed in the light of the legislative purpose, they do not justify the conclusion that the distinction between the higher executive officers of a corporation and its workmen was obliterated. A workman in a broad sense is one who works in any department of physical or mental labor, but, in common speech, is one who is employed in manual labor, such as an artificer, mechanic or artisan, while an employee in a broad sense is one who receives salary or wages or other compensation from another, but in common speech is usually applied to clerks, laborers, etc., and not to the higher officers of a corporation.

3. The president and principal executive officer of a corporation which employs workmen in carrying on a hazardous occupation is not entitled as such to the benefits of the Workmen's Compensation Law as an employee if he meets with an accident.

Matter of Bowne v. Bowne Co., 176 App. Div. 181, reversed.

(Argued April 20, 1917; decided May 8, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 17, 1917, affirming an award of the state industrial commission made under the Workmen's Compensation Law.

The facts, so far as material, are stated in the opinion.

Jeremiah F. Connor for appellants. The claimant was not an employee or a workman within the meaning of the Workmen's Compensation Law. (*Bristol v. Smith*, 158 N. Y. 157; *Palmer v. Van Santvoord*, 153 N. Y. 612; *Matter of Petrie*, 215 N. Y. 335; *Post v. Burger & Gohlke*, 216 N. Y. 544; *Rheinwald v. Builders' B. & S. Co.*, 168 App. Div. 425; *Simpson v. Ebba Vale Steel, Iron & Coal Co.*, L. R. [1905] 1 K. B. 453; *Bagnall v. Levinstein*, L. R. [1907] 1 K. B. 531; *Sibley v. State*, 96 Atl. Rep. 161.)

Henry B. Gayley for respondent. Claimant, respondent, was an employee within the meaning of the Workmen's Compensation Law. (Cons. Laws, ch. 67, § 3,

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subd. 3; *Matter of Rheinwald v. Builders' B. & S. Co.*, 168 App. Div. 425; *Matter of Larsen v. Paine Drug Co.*, 218 N. Y. 252; *Matter of Collins v. B. U. Gas Co.*, 171 App. Div. 381; *Sullivan v. Industrial Engineering Co.*, 173 App. Div. 65; *Gurney v. A. & G. W. R. R. Co.*, 58 N. Y. 358; *Aken v. B. & C. Co.*, 118 App. Div. 463; 192 N. Y. 554; *Ericsson v. Brown*, 38 Barb. 390; *Coffin v. Reynolds*, 37 N. Y. 640; *Wakefield v. Fargo*, 90 N. Y. 213; *Matter of Stryker*, 158 N. Y. 526.)

POUND, J. The question presented on this appeal is whether the president and principal executive officer of a corporation which employs workmen in carrying on a hazardous occupation is entitled as such to the benefits of the Workmen's Compensation Law (Cons. Laws, ch. 67) as an employee if he meets with an accident.

The claimant was the president and majority stockholder of S. W. Bowne Company, which was engaged in the manufacture of cattle foods. (Group 29.) He was the principal executive officer. His salary was \$70 a week. He met with an accident on March 6, 1916, while performing manual labor, assisting other employees of the corporation in handling lumber, which resulted in the loss of his left leg. His salary was not interrupted by the accident. His stock dividends in the preceding year amounted to \$30,000. The industrial commission found he was "employed as president" of the company and that the accident arose out of and in the course of such employment and awarded him the maximum compensation of \$20 per week for two hundred and eighty-eight weeks. The compensation payment for the loss of a leg shall not exceed \$20 a week. (Workmen's Compensation Law, § 15, subd. 5.)

Conceding that a corporation may employ its officers as workmen, to handle lumber, operate lathes or set brakes, or to act as superintendents and foremen, it must also be conceded that the higher executive officers of a

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corporation are not, as such, its employees in the ordinary use of the word, nor are they expected to perform manual labor. The question is plainly presented whether the principal executive officer of a corporation is an employee within the definition of the word contained in the Workmen's Compensation Law. "The intention of the law giver is to be sought first in the words of a statute, and, if they are obscure, in the occasion of the enactment and in the policy which dictated it, when that can legitimately be ascertained." (*Palmer v. Van Santvoord*, 153 N. Y. 612, 615.)

The title of the Workmen's Compensation Law is as follows: "An act in relation to assuring compensation for injuries or death of *certain employees* in the course of their employment and repealing certain sections of the Labor Law relating thereto, constituting chapter sixty-seven of the Consolidated Laws."

Section 1 provides that it shall be known as the *Workmen's Compensation Law*. Section 2 provides for compensation to *employees*. Section 3 defines *employer* and *employee* as follows:

"3. 'Employer,' except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments including the state and a municipal corporation or other political subdivision thereof (Subd. 3, amd. by L. 1914, ch. 316). 4. 'Employee' means a person who is engaged in a hazardous employment *in the service of* an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants."

The words of the statute are not clear. A workman in a broad sense is one who works in any department of physical or mental labor, but, in common speech, is one

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who is employed in manual labor, such as an artificer, mechanic or artisan, while an employee in a broad sense is one who receives salary or wages or other compensation from another (*Gurney v. Atlantic & G. W. Ry. Co.*, 58 N. Y. 358), but in common speech the term is usually applied to clerks, laborers, etc., and not to the higher officers of a corporation. The statutory definition speaks of one "*in the service*" of an employer. In a broad sense the officers of a corporation serve it, but in common speech they are not referred to as its servants or employees. (*Matter of Stryker*, 158 N. Y. 526.)

We turn to the occasion of the enactment and the policy thereof. In *Matter of Petrie* (215 N. Y. 335, 338) it was held that "The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to *workmen* who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a *workman* from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the legislature as a wise public policy concerning injured employees." And in *Matter of Post v. Burger & Gohlke* (216 N. Y. 544, 553) this court said: "The act was passed pursuant to a widespread belief in its value as a means of protecting *workingmen* and their dependents from want in case of injury when engaged in certain specified hazardous employments. It was the intention of the legislature to secure such injured workmen and their dependents from becoming objects of charity." In *N. Y. Central R. R. Co. v. White* (243 U. S. 188) Mr. Justice PITNEY, delivering the opinion of the court on the constitutionality of the Workmen's

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Compensation Law of this state, said: "In support of the legislation, it is said that the whole common law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the *injured workman* is left to bear the greater part of industrial accident loss which *because of his limited income he is unable to sustain, so that he and those dependent on him are overcome by poverty and frequently become a burden upon public or private charity*; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees."

The words of the statute, construed in the light of the legislative purpose, do not justify the conclusion that the distinction between the higher executive officers of the corporation and its workmen was obliterated. (*Bristor v. Smith*, 158 N. Y. 157; *Wakefield v. Fargo*, 90 N. Y. 213; *Matter of Stryker*, 158 N. Y. 526.) The short title of the act, the limitation thereof to employers *employing workmen*, the evil to be remedied, the method of remedying the evil, the obvious incongruity of applying the law to the principal executive officer of a corporation as an accident insurance at the maximum rate of not to exceed \$20 a week based on loss of earning power, all point conclusively to a distinction between such an officer and other employees which the court should not disregard.

The claimant in this case is willing, in order to collect a workman's allowance for himself from the insurance

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carrier, to assume a *status* that he might be the first to disclaim for any other purpose. Theoretically he was subject to the orders of his corporation and was liable to be discharged for disobedience. Practically he *was* the corporation and only by a legal fiction its servant in any sense. Section 30 of the act provides that "no *benefits, savings or insurance* of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter." But these words are appropriate to the meager advantages of a workman and not to the comfortable dividends of the stockholder. Upon the most liberal construction contended for consistent with the purpose of the law the order should be reversed, with costs in this court and in the Appellate Division against the industrial commission, and the claim dismissed.

HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, McLAUGHLIN and ANDREWS, JJ., concur.

Order reversed, etc.

INNES GETTY, Appellant, *v.* ROGER WILLIAMS SILVER COMPANY, Respondent.

Trial—when verdict may be directed or complaint dismissed—master and servant—action for wrongful discharge—when facts do not justify discharge—erroneous reversal by Appellate Division of judgment for plaintiff rendered upon the verdict of a jury—bad motive or ignorance of adequate reason immaterial.

1. If, in the discretion of the court, a verdict *may* be set aside, the parties are not thereby deprived of a jury trial. It is only when a verdict for the plaintiff *must* be set aside as unsupported by sufficient evidence that a verdict for the defendant should be directed or the complaint dismissed.

2. Where the facts, in an action brought to recover damages for plaintiff's wrongful discharge from defendant's employment, present a close case but not a clear case, defendant must reasonably satisfy a jury that plaintiff was guilty of misconduct justifying his discharge.

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3. Where plaintiff, a sales agent selling silverware for a manufacturing corporation on commission, was furnished with an office or sample room on the tenth floor of an office building with a helper, who had been employed for two years, and such helper, who had been instructed by plaintiff to deliver some trunks of samples to an express company, left them unguarded in the hall of the building and they were stolen before the express wagon arrived, and thereupon the defendant discharged plaintiff, such discharge was not justified as matter of law. Upon the evidence, plaintiff was entitled to go to the jury, and the order of the Appellate Division reversing a judgment for plaintiff rendered upon the verdict of the jury should be reversed.

4. Bad motive for strict insistence on legal rights, or even ignorance of a sufficient cause at the time of discharge, does not preclude an employer from justifying its act in discharging an employee.

Getty v. Williams Silver Co., 162 App. Div. 518, reversed.

(Argued May 8, 1917; decided May 15, 1917.)

APPEAL from a judgment entered June 23, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Martin L. Stover, Alfred C. B. McNevin and Hardie B. Walmsley for appellant. Time and manner of discharge of the plaintiff was a question for the jury which, on all the testimony, has properly been resolved in plaintiff's favor. (1 *Labatt on Master & Servant*, 581; *Arnold v. Adams*, 27 App. Div. 345; *Sigmon v. Goldstone*, 116 App. Div. 490; *Wardlaw v. Mayor, etc., of New York*, 137 N. Y. 194; *Ryan v. Mayor, etc., of New York*, 154 N. Y. 328.) The trial court properly submitted the case to the jury, including the question of the sufficiency of the alleged negligence of plaintiff as justifying his discharge. (*Edgecomb v. Buckhout*, 83 Hun, 168; 146 N. Y. 332; *Stokes v. Johnson*, 57 N. Y. 275; *Hackford v. N. Y. C. & H. R. R. R. Co.*, 53 N. Y. 654; *Turner v. Kouwen-*

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hoven, 100 N. Y. 115; *Smith v. Allen*, 3 F. & F. 157; *Newman v. Reagan*, 65 Ga. 512; *Ware v. G. & M. M. Ex. Co.*, 119 App. Div. 262.)

Stephen P. Anderton, Miguel E. de Aguero, Jr., and Ewen R. Philbin for respondent. Upon the facts, the complaint was properly dismissed. (*Jerome v. Q. C. C. Co.*, 163 N. Y. 351; *Allen v. Glen Creamery Co.*, 101 App. Div. 306; *Gross v. Kathario Co.*, 127 App. Div. 165; *Deane v. Cutler*, 48 N. Y. S. R. 404; *Edgecomb v. Buckhout*, 93 Hun, 168; *Hutchinson v. Washburn*, 80 App. Div. 367; *Huntingdon v. Caflin*, 38 N. Y. 182; *Ball v. Livonia S. & M. Co.*, 8 Misc. Rep. 333.)

POUND, J. The action is to recover damages for the alleged wrongful discharge of plaintiff from defendant's employ, and the only question on this appeal is whether on the evidence plaintiff was entitled to go to the jury. Defendant manufactures silverware at Providence, R. I. It first employed plaintiff in 1907, but in 1909 he was placed in charge as sales agent of a New York office or sample room on the tenth floor of an office building at No. 520 Fifth avenue. The office was equipped with goods for display purposes, but plaintiff traveled widely and took samples about with him. He was to be paid a commission of nine per cent on all goods sold in his territory. He was to receive \$250 a month and traveling and office expenses, including clerk hire, which were charged against his nine per cent commission. At the end of the year he was to receive the difference between the nine per cent and the advances, but if the advances exceeded the nine per cent he was to remit the balance to the company. He continued the business on a yearly hiring through the years 1909 and 1910 and until July 1, 1911, when he was discharged, as he claims, wrongfully; as the defendant claims for a clear violation of duty. He had in his care goods worth \$10,000 to

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\$15,000. Not only were his sales considerable in themselves, being upwards of \$100,000 a year, but in 1910 they amounted to nearly fifty per cent of the total sales of the defendant. His total earnings for that year were upwards of \$5,000. His only helper in the office was a nineteen year old boy named Childs who had, at the time of the discharge, been employed for two years. On or about June 26, 1911, an incident occurred on which defendant seeks to justify the discharge of plaintiff. He had two trunks of samples, worth about \$2,000, to be shipped to Providence. No goods were shipped from the New York office to customers, but plaintiff took out his trunks from there when he went on his trips and sometimes shipped samples back to the factory. Childs, who looked after the shipments, on this occasion took the trunks down on the elevator and left them in the hall. He had telephoned for the express company to send for them, but before the wagon arrived the trunks disappeared, after they had been in the hall not more than fifteen minutes. Plaintiff testifies that he did not know that goods were left in the hall until after the robbery; that he left the whole matter to Childs. It does not appear that he gave Childs any definite instructions or supervised his work in this regard. It cannot be denied that Childs was careless in leaving the silverware unguarded in the public hall of an office building. On June 22, 1911, two trunks full of silverware were left in the hallway over night because the expressman refused to take them, having no room on the wagon for them. Plaintiff knew that these trunks were not taken by the express company until the next morning, for he reported the fact to the defendant. No losses of silverware had previously occurred which can be said as matter of law to have been the result of carelessness. An insurance company paid defendant \$1,800 on this loss. On June 30 plaintiff was notified by defendant that his services would no longer be required.

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defendant was justified in discharging plaintiff; that he was guilty of culpable negligence,—“careless in the extreme,”—in handling defendant’s business and property; that he was chargeable personally with the act of Childs in leaving the silverware unguarded in the hall, and that his complaint must be dismissed. We think that it is not so clear that plaintiff was guilty of conduct inconsistent with the due and faithful discharge of the duties for which he was engaged. Childs had handled the shipments for two years and the inferences most favorable to plaintiff (*McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 394) do not compel the conclusion that he knew or should have known that Childs was in the habit of leaving packages of silverware unguarded in the public hallway. Childs, as well as plaintiff, was the employee of the defendant. It cannot be said as matter of law that it was misconduct on plaintiff’s part to intrust him with the simple duty of shipping out the trunks and packages. Plaintiff could not be expected to stand guard personally over the trunks. His time was valuable both to the company and himself. He had the right to trust some one and the insurance against loss by theft was some protection. If he took proper precautions to have a reliable office boy he might assume that the office boy would not on a given occasion neglect his duty. Obviously the misconduct of the boy might be brought home to him as matter of fact. It might be inferred from the general practices of the boy or from the conduct of plaintiff. But it is not incredible as matter of law that he did not know and would not necessarily in the exercise of proper care have known that Childs was leaving the defendant’s property exposed to theft. The facts are uncontradicted, but the logical deductions therefrom do not point in one direction. One reasonable mind might differ from another in drawing conclusions therefrom. (*Tousey v. Hastings*, 194 N. Y. 79.) It is a close case but not a clear case, and, therefore, defendant must reasonably satisfy a jury that

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plaintiff was guilty of misconduct. If, in the discretion of the court, a verdict *may* be set aside, the parties are not thereby deprived of a jury trial. It is only when a verdict for the plaintiff *must* be set aside as unsupported by sufficient evidence that a verdict for the defendant should be directed or the complaint dismissed. (*McDonald v. Metropolitan Street Ry. Co.*, 167 N. Y. 66; *Matter of Case*, 214 N. Y. 199.) The Appellate Division looks into the evidence and reviews the facts, but it is not an appellate jury.

It is beside the main question that defendant had decided before the trunks were lost to discharge plaintiff on July 1, without cause, because he would not agree to a reduction of salary. Bad motive for strict insistence on legal rights, or even ignorance of a sufficient cause at the time of discharge, does not preclude defendant from justifying its act. (*Boston Deep Sea Fishing & Ice Co. v. Ansell*, L. R. [39 Ch. D.] 339, 357.)

The judgment appealed from must be reversed, but the decision below having been made prior to September 1, 1914 (*Middleton v. Whitridge*, 213 N. Y. 499; *Junkermann v. Tilyou Realty Co.*, 213 N. Y. 404, 410), the case must be remitted to the Appellate Division for consideration of the weight of evidence, with costs in this court.

HISCOCK, Ch. J., COLLIN, CARDOZO, CRANE and ANDREWS, JJ., concur; McLAUGHLIN, J., dissents.

Judgment reversed, etc.

ANNA WEIGAND, Respondent, *v.* UNITED TRACTION COMPANY, Appellant.

Negligence — person struck by approaching trolley car while crossing a street — duty to look for and see such car when there are no obstructions to the view.

A judgment for plaintiff rendered on the verdict of a jury should be reversed where it is based on plaintiff's testimony that as she was about to cross a railroad track she looked in the direction of an

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approaching car which was in full view and did not see it, since the statement is incredible as a matter of law.

Weigand v. United Traction Co., 175 App. Div. 961, reversed.

(Argued April 30, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 16, 1916, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

John T. Norton and *John E. MacLean* for appellant. Plaintiff was guilty of contributory negligence as matter of law. (*Lofstin v. B. H. R. R. Co.*, 184 N. Y. 148; *Reed v. M. S. R. R. Co.*, 180 N. Y. 315; *McGreevy v. N. Y. C. R. R. Co.*, 113 App. Div. 155; *Pindar v. B. H. R. R. Co.*, 173 N. Y. 519; *Dolfini v. Erie R. R. Co.*, 178 N. Y. 1; *Hagglund v. Erie R. Co.*, 210 N. Y. 46; *Perez v. Sandrowitz*, 180 N. Y. 397; *Keller v. Erie R. Co.*, 183 N. Y. 67; *Rodrian v. N. Y., N. H. & H. R. R. Co.*, 125 N. Y. 526; *Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308; *Cullen v. D. & H. R. R. Co.*, 113 N. Y. 667; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; *Escher v. B. & L. E. T. Co.*, 220 N. Y. 243.)

Owen D. Connolly and *H. P. Humphrey* for respondent. The question of plaintiff's contributory negligence was properly submitted to the jury, whose finding is sustained by the evidence. (*Schwartzbaum v. T. A. R. R. Co.*, 60 App. Div. 274; *Bopp v. N. Y. El. V. Trans. Co.*, 177 N. Y. 33; *Porges v. U. S. Mortgage & Trust Co.*, 203 N. Y. 181; *Hill v. West End Ry. Co.*, 158 Mass. 458.)

ANDREWS, J. River street, Troy, runs north and south. Through its center are two tracks of the defendant's railroad with a distance between them of about four feet eight inches.

Anna Weigand is some twenty-four years of age. She

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was born deaf and dumb, but has attended school, is able to read and write, and has been engaged in dress making and in work in a collar factory, earning from eight to fifteen dollars a week. She is, therefore, a woman of intelligence.

On the evening of February 10th, 1916, at about six o'clock, she was on the west side of River street toward the center of a block. She intended to cross at this point to the opposite sidewalk. To the south of her were standing four or five street cars. From her position they must have interfered with her view to the south, but in the street were no other vehicles or obstructions, and the tracks were on but a slight grade and ran in substantially a straight line.

In crossing the street the plaintiff passed behind one of these stationary cars. She walked across the space between the tracks and as she was about to step upon the north-bound track she was struck by the northwest corner of a car approaching from the south. Beyond the south-bound car on the west track her view of the car which caused the accident was absolutely unobstructed.

It is for the injury so caused that she seeks to recover damages.

The first question for us to consider is whether the case contains any evidence to justify a finding of due care on her part. As to this, we are confined to her own testimony. Certainly no other witness relates facts from which such an inference might be drawn.

Her story is that when she walked into the space between the tracks she could see to the south for a distance of one hundred and thirty-five feet; that she stopped and looked in that direction; that she kept looking until she was struck, and that she saw no approaching car.

The respondent claims that the witness was confused; that she was giving evidence through an interpreter and that we may infer that she intended to say something other than she did say.

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It may be so. If it is, she may explain herself upon another trial. But in this court we must take the record as we find it.

We have, therefore, the not unusual situation of a plaintiff testifying that when about to cross a railroad she looked in the direction of an approaching car in full view and did not see it. She was bound to see it. She was bound to see what by the proper use of her senses she might have seen. The statement that a witness does not see what she should have seen is incredible as a matter of law.

In his charge to the jury the trial judge made the question of negligence of the defendant depend entirely upon the speed at which the car was operated. Whether it should have been so limited we need not decide here.

The judgment of the Appellate Division should be reversed and a new trial ordered, with costs to abide the event.

HISCOCK, Ch. J., CARDODO, POUND, McLAUGHLIN and CRANE, JJ., concur; COLLIN, J., absent.

Judgment reversed, etc.

**WHITEHALL WATER POWER COMPANY, LIMITED, et al.,
Appellants, v. ATLANTIC, GULF AND PACIFIC COMPANY,
Respondent.**

Water and watercourses — action to restrain alleged trespass upon lands and waters — record examined and held that action cannot be maintained.

Plaintiff, a manufacturing corporation, part of whose dam across a stream was on property of the state, without authority or permission therefrom, entered into an agreement with defendant, a contractor engaged in the improvement of a section of the barge canal for the state, whereby plaintiff in consideration that it should be furnished with motive power during the construction by defendant of a new dam for the state at another point consented to the destruction

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of the old dam previously erected by plaintiff. The old dam was destroyed and during the construction of the new dam the power furnished by defendant to plaintiff was greater than that plaintiff could have obtained from the old dam. The defendant under a contract with the state constructed a new dam, with more water head than the removed dam was capable of producing, and with a much larger storage capacity, which plaintiff has since continuously used. Plaintiff brought this action against the defendant to restrain trespass and a threatened trespass upon its lands and waters. *Held*, that upon the facts found by the trial court the action cannot be maintained.

Whitehall Water Power Co. v. Atlantic, Gulf & Pacific Co. 160 App. Div. 208, affirmed.

(Argued April 26, 1917; decided May 22, 1917.)

APPEAL from a judgment, entered June 15, 1914, upon an order of the Appellate Division of the Supreme Court in the third judicial department reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edgar T. Brackett, Benjamin P. Wheat and Luther A. Wait for appellants.

Russell H. Robbins for respondent.

Merton E. Lewis, Attorney-General (Wilber W. Chambers of counsel), for State of New York.

HOGAN, J. This action was brought to restrain trespass and a threatened trespass upon land and waters alleged to be the property of plaintiff, Whitehall Water Power Company, a manufacturing corporation. The Champlain Silk Mill Company is a tenant of the Whitehall Water Power Company. The defendant is a corporation engaged in the business of contracting. August

9th, 1906, defendant entered into a contract with the state of New York under the Barge Canal Act for the improvement of a portion of the Champlain canal for a distance of about six miles south of the southerly end of Lake Champlain. The findings, so far as material to be considered here, are in effect:

In 1902 plaintiff erected a dam across Wood creek, a portion of which was constructed on land within the blue line, the property of the state, without authority of or permission from the state. The specifications accompanying the contract between defendant and the state did not provide for the removal of the dam erected by plaintiff. The plans and specifications were thereafter changed so as to provide for the construction of a dam, sluiceways, etc., in place of the existing dam, at another point. Subsequently and on May 6th, 1909, before any change of plan, an agreement was entered into between the parties to this action, whereby plaintiff in consideration that it should be furnished with motive power during the time of the construction of the new dam and water power therefrom, consented to the destruction of the dam theretofore erected by it. The old dam was destroyed and during the construction of the new dam the power furnished by defendant to plaintiff was greater than plaintiff could have generated from the old dam had it remained undisturbed. The defendant under its contract with the state constructed a new concrete dam with four and one-half feet more water head than the removed dam was capable of producing and with a water storage of five times that of the old dam, which plaintiff by a siphon and spillway has since continuously used.

From the foregoing facts, amongst a number incidental thereto upon the same subject, the court below concluded that plaintiff's consent and acquiescence was a bar to a recovery. Making reference to the findings, counsel for appellants in his brief and upon the argument stated "it cannot be disputed that the consent to the

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destruction of the dam was based upon the assumption and agreement that there would be a new dam erected in its place which would furnish plaintiff more water head," and argued that in view of the fact that subsequent to the commencement of this action but before the trial, the state had appropriated all the right, title and interest plaintiff had or claimed to have in the land used by defendant in performing its contract, therefore, plaintiff Whitehall Water Power Company had no dam, and the question as to whether plaintiff is damaged depends upon whether or not plaintiff has a present and permanent right to the use of the dam and the water power.

The defendant in this action was a contractor of the state. As such it had no authority, without the consent of the state, to make any change in the plans or specifications for the improvement of the Champlain canal. It must be assumed that the changes which involved the construction of the new dam were not only made with the consent of the plaintiff but were actually made by the state of New York. The subsequent appropriation by the state of an absolute ownership of the dam and water does not warrant a presumption that the state intends to deprive plaintiff of the use of water power. In fact plaintiff has not been interfered with in the exercise of any privileges conferred under the agreement. Should the state hereafter deprive plaintiff of the privilege to utilize the power at the dam, the right of plaintiff to make claim, either for temporary or permanent deprivation of such privilege may arise; until then the plaintiff cannot complain. It is now supplied with an increased head of water by reason of its consent, and the mere fact of appropriation of rights at the dam does not operate as a violation of the agreement.

Additional questions involving the title of the bed of Wood creek, whether or not the same was vested in the Whitehall Company or the state, estoppel against the

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state, Statute of Limitations, etc., were argued on the appeal. The state was not a party to the action, and its rights are not decided upon this appeal.

The judgment should be affirmed, with costs.

HISCOCK, Ch. J., CHASE, CARDODOZO, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgment affirmed.

WHITE STUDIO, INC., Appellant, *v.* ALEXANDER W. DREYFOOS et al., Doing Business under the Firm Name of APEDA STUDIO, Respondents.

Unfair competition in trade —photographer may maintain action to restrain competitor from selling reproductions of plaintiff's original photographs, using plaintiff's name thereon.

1. Unfair competition in trade or business may result from representations or conduct which deceive the public into believing that the business name, reputation or good will of one person is that of another.

2. An action to restrain unfair competition may be maintained by a photographer to restrain the sale by a competitor of reproductions of plaintiff's original photographs of stage scenes and characters representing them to be the originals made by the plaintiff, using the plaintiff's trade name thereon.

White Studio v. Dreyfoos, 160 App. Div. 885, reversed.

(Argued April 27, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 1, 1914, affirming a judgment in favor of defendants entered upon an order of the court at Special Term granting a motion by defendants for judgment on the pleadings.

The nature of the action and the facts, so far as material, are stated in the opinion.

I. Maurice Wormser and Leon Laski for appellant. The complaint sets forth a perfectly sound cause of action within the elastic jurisdiction of a court of equity.

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Plaintiff's trade name and business reputation should be protected and the defendants should be restrained from their unfair and deceitful conduct. Defendants are selling broadcast reproductions of photographs taken by plaintiff and are leaving thereon plaintiff's trade name, "White," thus deceiving the public, or in some instances removing plaintiff's trade name "White" therefrom and substituting their own trade name, "Apeda." This course of conduct may be prevented by the plastic remedies of chancery. (*Croft v. Day*, 7 Beav. 84; *Meneely v. Meneely*, 62 N. Y. 427; *Order of Elks v. Order of Elks of the World*, 205 N. Y. 459; *Society of the War of 1812 v. Society of the War of 1812 in the State of New York*, 46 App. Div. 568; 62 N. Y. Supp. 355; *Salvation Army in United States v. American Salvation Army*, 135 App. Div. 268; 141 App. Div. 931; Clark on Corporations [3d ed.], 79, 80; *Borthwick v. Evening Post*, L. R. [37 Ch. Div.] 449; *Gulden v. Chance*, 182 Fed. Rep. 303; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 651; *Maintowac Malting Co. v. Milwaukee Malting Co.*, 119 Wis. 543; *Burrow v. Marceau*, 124 App. Div. 665.) Beyond the purview of copyright there is a source of equitable remedy resting on general and fundamental principles of equity, and there is a right in cases of this sort to obtain equitable relief from the transgressor on the ground of unfair trade and improper competition without any reference at all to the law of copyright. (*Merriam Co. v. Straus*, 136 Fed. Rep. 477; Nims on Unfair Business Competition [1909], 195; *Chancellor of Oxford Univ. v. Wilmore-Andrews Pub. Co.*, 101 Fed. Rep. 443; *Ogilvie v. Merriam Co.*, 149 Fed. Rep. 858; *Weinstock v. Marks*, 109 Cal. 529; Burdick on Torts [1st ed.], 391, 392.)

W. N. Seligsberg and Clarence M. Lewis for respondents. The complaint does not state any cause of action at law or in equity. (*Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538; *Corliss v. Walker Co.*, 64 Fed.

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Rep. 280; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Clemens v. Belford, Clark & Co.*, 14 Fed. Rep. 728; *Atlas Mfg. Co. v. Street & Smith*, 204 Fed. Rep. 398; *Munn & Co. v. Americana Co.*, 91 Atl. Rep. 87; *Heine v. Appleton*, 4 Blatchf. 125; *Donaldson v. Wright*, 7 App. Cas. [Dist. Col.] 45; *Dielman v. White*, 102 Fed. Rep. 892.)

CRANE, J. This action is brought to restrain unfair competition, and the Appellate Division has decided that the complaint does not state a cause of action.

We agree with the Appellate Division that so much of the complaint as alleges that the defendants reproduced photographs of individuals taken by the plaintiff, placing thereon the name of "Apeda, New York," does not state a cause of action.

The complaint, however, further alleges that the plaintiff took photographs of stage scenes and characters, known in the theatrical profession as "flash lights" and affixed thereto its trade name "White;" that such pictures are used in the lobbies of theatres and elsewhere for exhibition where the play is being presented. It further alleges that the defendants, intending to deceive the public into believing that they were the original takers and makers of said flash light photographs, reproduced them, placing thereon the name "White, New York," and that the defendants thereby intended to and actually did deceive the public into the belief that they were purchasing the original flash light photographs made by the plaintiff, when, in fact, the photographs were reproductions made by the defendants, and that such acts were unfair competition injuring the plaintiff.

The defendants have no right to sell reproduced photographs of stage plays, representing them to be the originals made by the plaintiff, using the plaintiff's name thereon.

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"The doctrine of unfair trade amounts to no more than this: One person has no right to sell goods as the goods of another, *nor to do other business as the business of another*, and on proper showing will be restrained from so doing." (*Dyment v. Lewis*, 144 Iowa, 509, 513; 38 Cyc. 756; *Ball v. Broadway Bazaar*, 194 N. Y. 429, 435; *Munro v. Tousey*, 129 N. Y. 38; *Benevolent & Protective Order of Elks v. Improved B. & P. Order of Elks*, 205 N. Y. 459; *Weinstock v. Marks*, 109 Cal. 529; *Gulden v. Chance*, 182 Fed. Rep. 303.)

Unfair competition may result from representations or conduct which deceive the public into believing that the business name, reputation or good will of one person is that of another. (*Glen & Hall Mfg. Co. v. Hall*, 61 N. Y. 226; *Howard v. Henriques*, 3 Sandf. 725; *Lee v. Haley*, L. R. [5 Ch. App.] 155; *Halbrook v. Nesbitt*, 163 Mass. 120, 125; *American Tobacco Co. v. Polacsek*, 170 Fed. Rep. 117.)

As to these allegations the complaint states a good cause of action.

The judgment should be reversed and the motion denied, with costs to the appellant in all courts.

HISCOCK, Ch. J., CHASE, HOGAN and ANDREWS, JJ., concur; CARDozo and McLAUGHLIN, JJ., not sitting.

Judgment reversed, etc.

MARGARET B. COUTANT, Appellant, *v.* JENNIE C. MASON,
Respondent.

Replevin — gift — action to recover possession of property claimed by plaintiff as a gift from her deceased husband — erroneous dismissal of complaint by Appellate Division — credibility of witnesses question for the jury.

Where the widow of a decedent brought an action of replevin against his daughter by a former marriage to recover the possession of furniture and household goods which plaintiff claimed as a gift from her deceased husband, which articles defendant also claimed as

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a gift, and there was evidence of such a gift to plaintiff by the testimony of several witnesses sufficient to make out a *prima facie* case, it was error for the Appellate Division on reversing the judgment for plaintiff, entered upon a verdict of a jury, to dismiss the complaint upon the ground that there was no evidence to sustain the plaintiff's claim. The credibility of the witnesses was for the jury, and even if some witnesses for plaintiff were interested, as claimed by defendant, their testimony cannot be disregarded by the court. Hence the action of the Appellate Division in dismissing the complaint cannot be sustained.

Coutant v. Mason, 160 App. Div. 575, reversed.

(Argued May 2, 1917; decided May 22, 1917.)

APPEAL from a judgment, entered May 15, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry L. Scheuerman and *Theodore F. Kuper* for appellant. Plaintiff has established title in herself. (*Rheinfeldt v. Dahlman*, 19 Misc. Rep. 162; *Miller v. Benoit*, 29 App. Div. 252; 164 N. Y. 590; *Hull v. Littauer*, 162 N. Y. 569; *Kavanagh v. Wilson*, 70 N. Y. 179; *Matter of Schroeder*, 113 App. Div. 204; *Allen v. Cowen*, 23 N. Y. 502; *Grangiac v. Arden*, 10 Johns. 293; *Porter v. Gardner*, 60 Hun, 571.) Plaintiff clearly established every detail and element of her case. (*Grangiac v. Arden*, 10 Johns. 293; *Porter v. Gardner*, 60 Hun, 571; *Crounse v. Judson*, 41 Misc. Rep. 338; 93 App. Div. 604.)

Charles E. Travis for respondent. The plaintiff, appellant, failed to produce clear and conclusive evidence of the alleged gift *inter vivos*. (*Martin v. Funk*, 75 N. Y. 134; *Bedell v. Carll*, 33 N. Y. 581; *Jackson v. Twenty-third Street Railway Company*, 88 N. Y. 520.) The plaintiff, appellant, was required to produce evidence

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which should be strong and conclusive in order to establish her cause of action. (*Hamlin v. Stevens*, 177 N. Y. 39; *Matter of Seitz*, 17 App. Div. 1; *Rousseau v. Rouss*, 180 N. Y. 116; *Roberge v. Bonner*, 185 N. Y. 268; *Mahaney v. Carr*, 175 N. Y. 454; *Ide v. Brown*, 178 N. Y. 26; *Edison v. Parsons*, 155 N. Y. 555; *Lucas v. Boss*, 110 App. Div. 220; *Holt v. Tuite*, 188 N. Y. 17.)

CRANE, J. Charles A. Coutant had resided for many years at 728 St. Nicholas avenue, in the borough of Manhattan, city of New York, the defendant, his daughter, Jennie Coutant Mason, and her husband, residing with him. On April 20, 1909, at Wilmington, Delaware, he married the plaintiff, Margaret B. Coutant, and thereafter and until the time of his death on June 1, 1910, he and his wife and the defendant and her husband lived together at the above address.

When thereafter, on July 28, 1910, Mrs. Coutant left the house, she demanded of the daughter the household furniture and furnishings, claiming them as a gift to her by her late husband, Mr. Coutant. Possession being denied she commenced this action in replevin to recover the property, and obtained a judgment for the possession of the chattels, or the sum of \$5,719.70, the value thereof.

The Appellate Division reversed the judgment and dismissed the complaint, and also dismissed the appeal from the order denying the motion for a new trial. This decision of the Appellate Division was based upon the assumption that there was no evidence to sustain the plaintiff's claim and the opinion so states. (160 App. Div. 575.)

Upon the appeal to this court it is conceded that the only question before us is whether the plaintiff at the Trial Term made out a case which warranted the trial justice in submitting the question of gift to the jury. If she did, the judgment of the Appellate Division must be reversed and the judgment of the lower court reinstated. This is the only alternative.

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We think there was evidence of a gift by Mr. Coutant to the plaintiff of the household furniture and furnishings which required the jury to pass upon the question of a gift, and while the Appellate Division might have reversed the judgment and granted a new trial, its action in dismissing the complaint cannot be sustained.

Six witnesses testified that at various times and places Mr. Coutant stated to them that he had given all his furniture and furnishings in his house, 728 St. Nicholas avenue, to his wife, the plaintiff, as a wedding present. The circumstances under which such statements were made do not render them unlikely or improbable.

Mrs. Louisa A. Stevenson, living in Garden City, had known Mr. Coutant for seven years, longer than she had known the plaintiff, and she testifies that while at dinner at her home on Christmas night of 1909 Mr. Coutant said: "He would like his wife to take an apartment and furnish it with the furniture that he had given her in 728 St. Nicholas Avenue."

Morris H. Mann, residing at 230 Riverside Drive, being in the real estate business, and having a client who was looking for a furnished house, spoke to Mr. Coutant in July of 1909 about selling his house, 728 St. Nicholas avenue, furnished, and he replied "that he could not sell the house furnished as he had given the furnishings to Mrs. Coutant as a wedding present."

Mrs. Minnie Sulzbacher and her husband, Jerome Sulzbacher, friends of the plaintiff, testified to conversations with Mr. Coutant at their home, in which he stated that he had given the furnishings of his house to his wife as a wedding present; that he wanted to sell his house and take a small apartment.

To the same effect is the testimony of Otto B. Schulhoff, president and treasurer of the Reynard Company; while the testimony of James A. Stevenson corroborating that of his wife, Louisa A. Stevenson, adds an additional circumstance, a conversation with Mr. Coutant before his

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marriage, in which he stated "that he intended making the furniture, or the contents of the house, a present to— naming his fiancée at that time by her first name, Margaret, and he wouldn't sell any of it."

It will be noted that this action is not against the estate of Mr. Coutant but against his daughter by a prior marriage, who also claims the furniture and furnishings as a gift to her from her father. Evidence tending to support her claim was given on the trial.

The plaintiff was bound to establish her claim by a fair preponderance of the evidence and the court so charged the jury. The above excerpts from the testimony made out a *prima facie* case for the plaintiff. That the witnesses knew the plaintiff and that some of them had business dealings with her did not discredit them as a matter of law. The credibility of their evidence, in view of all the relationships, was for the jury. Even the testimony of an interested witness cannot be disregarded by the court. (*Hull v. Littauer*, 162 N. Y. 569; *Kavanagh v. Wilson*, 70 N. Y. 177, at 179.)

There have been three trials of this action. On the first trial, in April, 1911, a jury awarded the plaintiff a verdict which was set aside by the trial justice for failure of proof as to the value of the chattels. On the second trial, in April, 1912, the jury disagreed. Whether upon this third trial the Appellate Division would have been justified in setting aside the judgment for the plaintiff and granting a new trial is not for us to say, but for the reasons stated we do hold that the complaint should not have been dismissed.

The judgment of the Appellate Division should be reversed and the judgment for the plaintiff reinstated, with costs to the appellant in the Appellate Division and in this court.

HISCOCK, Ch. J., **COLLIN**, **CARDOZO**, **POUND** and **ANDREWS**, JJ., concur; **McLAUGHLIN**, J., not sitting.

Judgment reversed, etc.

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**CHARLES E. MILLER, Appellant, *v.* GEORGE HARVEY,
Respondent.**

Sale — vendor and vendee — loss of goods shipped by express — failure of vendor to state value of goods — when vendor cannot compel buyer to pay for goods shipped to take place of goods lost.

Where a vendor shipped by express to the buyer goods of the value of more than fifty dollars, which were paid for in advance, without declaring their value, thus relieving the express company from liability for more than that amount and the goods were lost in transit and a duplicate shipment was made to the buyer, the latter cannot be compelled to pay again. The general rule is that delivery to a carrier is delivery to the buyer, but the rule has its exceptions, one of which is applicable to this case. The seller must not sacrifice the buyer's right to claim indemnity from the carrier. (Personal Property Law, § 127; Cons. Laws, ch. 41, amd. L. 1911, ch. 571.)

Miller v. Harvey, 165 App. Div. 909, affirmed.

(Argued May 10, 1917; decided May 22, 1917.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 20, 1914, which affirmed a determination of the Appellate Term reversing a judgment of the Municipal Court of the city of New York in favor of plaintiff and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

William F. Goldbeck and Herman Goldman for appellant. When a buyer requests the seller to ship goods and does not instruct him as to the means and terms of shipment, he thereby authorizes the seller to ship under a limited liability contract. (*Nelson v. H. R. R. Co.*, 48 N. Y. 498; *Shelton v. M. D. Transp. Co.*, 59 N. Y. 258; *Root v. N. Y. & N. E. R. R. Co.*, 76 Hun, 23; *Waldron v. Fargo*, 170 N. Y. 130; *Jones v. N. Y., L. E.*

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& W. R. R. Co., 3 App. Div. 341; *Isaacson v. N. Y. C. & H. R. R. Co.*, 94 N. Y. 278; *McElvain v. St. L. & San F. R. R. Co.*, 151 Mo. App. 126.) Section 127 of the act does not in terms or by implication require a seller of goods to declare their full value upon shipping them. (*Krulder v. Ellison*, 47 N. Y. 37; *Mee v. McNider*, 109 N. Y. 500; *Schanz v. Bramwell*, 143 N. Y. Supp. 1057.) The shipping contract made by plaintiff was, under the circumstances of the case, reasonable. (*Zimmer v. N. Y. C. & H. R. R. Co.*, 137 N. Y. 460; *Boyle v. Bush Terminal Co.*, 210 N. Y. 389.)

Alexander S. Andrews and *John Larkin* for respondent. There was no delivery to the defendant of the tires and tubes sent July 17, 1912. (*Mills v. Weir*, 82 App. Div. 396; *Bernstein v. Weir*, 40 Misc. Rep. 635; *Adams Express Co. v. Croninger*, 226 U. S. 491; *Kansas, etc., R. R. Co. v. Carl*, 227 U. S. 639; *M., K. & T. Ry. Co. v. Harriman*, 227 U. S. 657; *Pierce Co. v. Wells Fargo Co.*, 236 U. S. 278; Pers. Prop. Law, § 127, subd. 2; 2 *Mechem on Sales*, § 1183; *Burdick on Sales* [1897], 158, 159; *Benjamin on Sales*, § 694; *Reid v. Fargo*, 241 U. S. 544; *Clarke v. Hutchins*, 14 East, 475; *Buckman v. Levy*, 3 Camp. 414; *Cathay v. Tute*, 3 Camp. 129; *Stafford v. Walter*, 67 Ill. 83; *Ward v. Taylor*, 56 Ill. 494; *Gordon v. Ward*, 16 Mich. 360; *Butterworth v. Cathcart*, 52 So. Rep. 896; *Lewis v. Imhof*, 138 Mo. App. 370.)

CARDOZO, J. The plaintiff sold to the defendant in the city of New York automobile tires which were to be sent by express to Allenhurst, New Jersey. The price, \$95.43, was paid by the defendant in advance. The seller intrusted the tires to an express company without declaring their value. The waybill states that the value was asked and not given. By the contract of carriage the liability of the carrier was limited to \$50, unless a greater value was "declared and paid for or agreed to be paid for

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at the time of shipment." The tires were lost in transit. The defendant notified the plaintiff of the loss and requested a duplicate shipment, which was made. The question to be determined is whether payment must be made again.

The general rule is that delivery to a carrier is delivery to the buyer (Sales of Goods Act, § 127, subd. 1, Pers. Prop. Law, as amended by L. 1911, ch. 571; Cons. Laws, ch. 41). But the rule has its exceptions (Sales of Goods Act, § 100, subd. 5; § 127, subds. 2 and 3). Only one of them will be considered. By section 127, subd. 2, of the Sales of Goods Act it is provided:

"Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages."

The statute is declaratory of the rule at common law. The seller must not sacrifice the buyer's right to claim indemnity from the carrier. That rule was declared more than a century ago in *Clarke v. Hutchins* (14 East, 475). In that case the carrier gave notice that it would not be answerable for any packages above £5 without special entry of value. The seller omitted the entry and was held to have assumed the risk. A more modern instance is a recent decision of the Supreme Court of the United States (*Reid v. Fargo*, 241 U. S. 544). An agent delivered an automobile to a carrier and accepted a bill of lading by which liability was limited to \$100. The acceptance of such a limitation was held to be a breach of duty. There are other cases of like tenor (*Buckman v. Levi*, 3 Camp. 414; *Stafford & Bro. v. Walter & Skelton*, 67 Ill. 83; *Lewis v. Imhof*, 138 Mo. App. 370; *Gordon v. Ward*, 16 Mich. 360). To the same effect are

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the leading text books (Williston on Sales, §§ 278, 595; Benjamin on Sales [5th ed.], p. 739; 2 Mecham on Sales, 1183; Burdick on Sales, § 694).

Tested by these principles, the plaintiff's case must fail. He limited the carrier's liability to \$50. He sacrificed the defendant's right of indemnity to the extent of almost one-half of the value of the shipment. He did this when full indemnity could have been procured by an additional payment of ten cents. That was not a reasonable protection of the interests of his principal. The plaintiff's argument, if sound, would require us to hold that the acceptance of a like limitation would be reasonable if the value had been \$1,000. Precedent and reason forbid that conclusion. The seller who puts the buyer at the mercy of the carrier must procure the buyer's approval or assume the risk himself.

Cases such as *Nelson v. Hudson River R. R. Co.* (48 N. Y. 498), *Shelton v. Merchants' Dispatch Transp. Co.* (59 N. Y. 258), and *Waldron v. Fargo* (170 N. Y. 130), cited by the plaintiff, are beside the mark. They deal with controversies between the owner and the carrier. They hold that the principal is not at liberty to repudiate as against the carrier the terms accepted by the agent. They have no bearing upon the measure of diligence owing from the agent to the principal (*Reid v. Fargo, supra*). It is significant that whenever the plaintiff made shipments C. O. D., he declared the value to the carrier. His duty was to safeguard the defendant's interests as sedulously as his own.

The judgment should be affirmed with costs.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK and HOGAN, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment affirmed.

TROY AUTOMOBILE EXCHANGE, Respondent, *v.* THE HOME INSURANCE COMPANY, Appellant.

Motion to dismiss complaint for failure to state a cause of action — when sufficiently definite, without pointing out the particular defect relied on.

1. Where in an action to recover upon a policy of insurance on an automobile upon the ground that it was stolen, and while being illegally used by the person taking it was destroyed, it appeared both from the complaint and the evidence that the alleged loss occurred before the policy became effective, and hence that the complaint failed to state a cause of action and the proof followed the pleading, the objection was not waived by failure to raise it more definitely than by a general motion to dismiss on the ground that the complaint does not state and the evidence does not establish a cause of action. The motion to dismiss the complaint upon the ground that it failed to state a cause of action was not based upon a mere technicality, but addressed itself to the merits.

2. Defendant's motion to dismiss, although general in form, not pointing out the particular defect, was proper. It was not like a general objection to evidence or a general motion for a nonsuit behind which something correctible may be hidden.

Troy Automobile Exchange v. Home Ins. Co., 164 App. Div. 761, reversed.

(Argued May 15, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 12, 1914, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

H. D. Bailey for appellant. The complaint sets up no cause of action. This question was properly raised in the trial court. (*Wormser v. Gen. Ac. Assur. Corp.*, 94 App. Div. 213; *Gerding v. Haskin*, 141 N. Y. 514; *Pagnillo v.*

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Mack P. & C. Co., 142 App. Div. 491; *Weeks v. O'Brien*, 141 N. Y. 199; *Wood & Sellick v. Ball*, 190 N. Y. 217; *Sanders v. Saxton*, 182 N. Y. 477; *Jones v. Reilly*, 174 N. Y. 97; *Tooker v. Arnoux*, 76 N. Y. 397; *Scofield v. Whitelegge*, 49 N. Y. 259; *Coffin v. Reynolds*, 37 N. Y. 640; *Emery v. Pease*, 20 N. Y. 62.) The nonsuit should have been granted. (*People v. Van Rensselaer*, 9 N. Y. 291; *Paige v. Willet*, 38 N. Y. 28; *Shotwell v. Dixon*, 163 N. Y. 43; *Storck v. M. E. R. Co.*, 131 N. Y. 514; *F. L. & T. Co. v. Siefke*, 144 N. Y. 354; *Heinemann v. Heard*, 62 N. Y. 448; *People ex rel. N. Y. C. & H. R. R. R. Co. v. P. S. Com.*, 159 App. Div. 546; *Argall v. Pitts*, 78 N. Y. 239.)

William H. Murray for respondent. The object of a trial in court is to enable the court and the jury to ascertain the facts and to decide rights of the respective parties on the matters actually litigated. The defendant did not point out to the trial justice any defect in the complaint. The defendant went to trial on the merits. (*Sterrett v. Third Nat. Bank*, 122 N. Y. 659; *Holmes v. Moffat*, 120 N. Y. 162; *Render v. Lillard*, 160 Pac. Rep. 705; *Eppley v. Kennedy*, 198 N. Y. 348; *St. John v. Northrup*, 23 Barb. 25; *Fountain v. Pettee*, 38 N. Y. 184; *Brozek v. Steinway Ry. Co.*, 161 N. Y. 65; *McGinley v. U. S. Ins. Co.*, 77 N. Y. 495; *Gerdig v. Haskin*, 141 N. Y. 520; *Binsse v. Wood*, 37 N. Y. 526.) No question having been raised by defendant as to the dates of the policy or any other feature in reference thereto, the proof and testimony presented by plaintiff as to the taking and theft of the automobile was sufficient to require the trial court to present same to the jury. The motion for nonsuit was properly denied. (*Person v. Stoll*, 72 App. Div. 141; 174 N. Y. 548; *Kraus v. Birnbaum*, 200 N. Y. 130; *Matter of Clark*, 168 N. Y. 427; *Megowan v. Peterson*, 173 N. Y. 1; *Flandrow v. Hammond*, 148 N. Y. 129.)

POUND, J. The action was brought to recover upon a policy of insurance on the ground that the plaintiff's automobile was stolen, and while being illegally used by the person taking it was destroyed. The complaint alleges, among other things, that on the 18th day of August, 1913, for a good and valuable consideration paid, the defendant made and delivered to the plaintiff its policy of insurance and also its certificate annexed to the policy, "wherein and whereby the said defendant did insure this plaintiff to the amount of \$1,000 from *the 30th day of September*, 1913, to the 30th day of October, 1913," and that upon *the 29th day of August*, 1913, the automobile was stolen. It thus appears that the insurance was not effective until after the loss and that the complaint does not state a cause of action. This objection may be raised by demurrer without pointing out the particular defect relied upon (Code Civ. Pro. § 490), but the objection was not waived by failure to raise it by demur-
rer. (§ 499.) It was raised by motion at the opening of the trial, but without pointing out the defect. It has been held that it is not too late to raise the question for the first time at the close of the trial. (*Weeks v. O'Brien*, 141 N. Y. 199, 204.) The ruling of the trial court denying defendant's motion to dismiss the complaint survives unanimous affirmance and is open to review in this court. (*Kelly v. Security Mut. Life Ins. Co.*, 186 N. Y. 16.) The Appellate Division has held that the objection was in such general form that the defendant may not now avail itself of the insufficiency of the complaint.

If this were a matter of variance between the pleading and proof; a failure to allege correctly the terms of the policy introduced in evidence; a mere technicality, the error would be disregarded if it appeared that the substantial rights of the adverse party were not affected thereby. (Code Civ. Pro. § 1317.) "The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Pro.

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§ 519.) But the record is destitute of the suggestion that the loss occurred while any policy was in force. The policy is in evidence. The date of the loss is not in dispute. The proofs follow literally the allegations of the complaint. No other policy was produced on the trial, in the Appellate Division or in this court. We must not guess that a policy covering the date of loss is in existence in order to affirm this judgment. The motion to dismiss addresses itself to the merits. No amendment has been asked for. The correctness of the ruling must be tested by the complaint as it stands, not as it might be changed by amendment. If we affirm this judgment we will hold that the defendant is liable for a loss which did not occur during the life of the policy. The defendant may have been disingenuous but the plaintiff has been careless and the plaintiff must make out its case. Procedure is still a matter of rules. Courts, applying such rules with the utmost liberality, must not assume that which does not appear. Substantial justice regards both parties equally. The defect is so manifest that he who runs may read. Defendant's motion is not like a general objection to evidence or a general motion for a nonsuit where something correctible may be hidden behind generalities. (*Haines v. N. Y. C. & H. R. R. Co.*, 145 N. Y. 235, 238.) It cannot be said that defendant concealed anything. To conceal here means more than failure to reveal. It means purposely to keep from sight. Plaintiff has had ample time to recover from its surprise to the extent of showing that the defect was amendable. When the question was raised neither court nor counsel sought an explanation. The entire responsibility for failure to discover the defect in the complaint does not rest on the defendant. If we could say that if the defect had been pointed out it could have been supplied, then we might say that good faith and fair practice required the defendant to point it out, but how can we say that?

In *Schoepflin v. Coffey* (162 N. Y. 12), on which plain-

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tiff relies, it was held that the question whether a cause of action for libel was stated could not be raised for the first time in this court.

No substantial errors were committed in receiving or excluding evidence nor in the charge, but on the complaint the judgment cannot be sustained. Yet the complaint should not be dismissed at this time on what may prove to be a technicality when the facts are shown.

The judgment should be reversed, and a new trial granted, with costs to abide the event, so that plaintiff may make a motion to amend its complaint if so advised, upon such terms as the Special Term may direct.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
MICHAEL SEPPI, Appellant.**

Murder — when evidence of identification of defendant as person who committed the crime incredible as a matter of law — erroneous charge of court as to effect of evidence of former identification — motive for crime — erroneous charge by court that motive should not be considered by jury.

1. Where a witness positively identifies a defendant as the man who committed a crime, the weight of the evidence of identification is for the jury unless it is incredible as a matter of law. But opinions expressed of the identity of a defendant particularly when they depend upon impressions obtained in haste and excitement should not be bolstered by self-serving performances of no probative value and yet strongly calculated to influence a jury of laymen not versed in the rules of evidence. (*People v. Jung Hing*, 212 N. Y. 898, 401, followed.)

2. On examination of the evidence in this case, *held*, that the identity of the defendant as the person who committed the homicide for which he was on trial was not shown with sufficient certainty to preclude a reasonable possibility of mistake.

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3. After the defendant was arrested on a charge of homicide and nearly three months after the homicide, some of the witnesses were taken to a detective bureau and there shown seven or eight men, but one of whom, and he, the defendant, was an Italian. The men were placed in a line with their backs to the entrance of the room and the witnesses were brought in one at a time to look at them. Two of the witnesses on request, it is alleged, pointed out the defendant. One witness identified defendant as the person he saw committing the homicide and running away therefrom, and another witness identified defendant as a man he followed on his bicycle from the immediate neighborhood of the homicide, and who threw away his revolver during the pursuit. Evidence was offered by the prosecution of what occurred at the detective bureau. The evidence so received was subject to objection and exception. It was undeniably offered and received for the purpose of bolstering the testimony already given at the trial by these two witnesses in identification of the defendant, and was so treated by the district attorney and the court. *Held*, that the admission of this evidence was prejudicial to the defendant and ground for reversal. (*People v. Jung Hing*, 212 N. Y. 398, 401, followed.)

4. Proof of motive is never indispensable to conviction for crime. Where testimony is presented on a trial which satisfies a jury that the defendant has committed a crime, it is sufficient for conviction although no motive therefor has been shown. In determining the guilt or innocence of a defendant, however, the question of motive is always to be considered by the jury in their deliberations. It was error, therefore, for the court to charge the jury that "Motive plays absolutely no part in your deliberations."

(Argued May 9, 1917; decided May 25, 1917.)

APPEAL from a judgment of the Supreme Court, rendered January 29, 1917, at a Trial Term for the county of Kings upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

Robert H. Elder and Otho S. Bowling for appellant. The evidence of identity is so weak and unsatisfactory that a new trial should be ordered. (*People v. Cassidy*, 160 App. Div. 651.) The trial court erred in permitting the People to show, as part of their direct examinations,

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that Oelrich and Stern had identified Seppi at police headquarters. (*People v. Jung Hing*, 212 N. Y. 393; *People v. Bertolini*, 218 N. Y. 584; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; *Schultz v. Union Ry. Co.*, 181 N. Y. 33; *Wilson v. Nassau Electric Ry. Co.*, 56 App. Div. 570.) The court erred in charging the jury as to motive. (*Kennedy v. People*, 39 N. Y. 245; *Pcinter v. United States*, 151 U. S. 396.)

Henry E. Lewis, District Attorney (Ralph E. Hemstreet and Harry G. Anderson of counsel), for respondent. All of the elements of murder in the first degree, as defined in subdivision 1 of section 1044 of the Penal Law, were proven by the prosecution beyond a reasonable doubt. (*People v. Trybus*, 219 N. Y. 18; *People v. Sanducci*, 195 N. Y. 361; *People v. Decker*, 157 N. Y. 186; *People v. Ferraro*, 161 N. Y. 365; *People v. Krist*, 168 N. Y. 19; *People v. Gaimari*, 176 N. Y. 84; *People v. Seidenshner*, 210 N. Y. 341.) No error was committed by the court with reference to its charge on the subject of motive. (*People v. Feigenbaum*, 148 N. Y. 636; *People v. Scott*, 153 N. Y. 40; *People v. Dinser*, 192 N. Y. 80; *People v. Sanducci*, 195 N. Y. 361.)

CHASE, J. On the afternoon of September 11, 1916, while Ernest Parisi was walking near the corner of Berriman street and Belmont avenue in the borough of Brooklyn, New York city, he was shot by a person who came up behind him. He died from the result of the wound. The man who fired the shot immediately thereafter turned and ran northerly along the east side of Berriman street to the corner of Pitkin avenue; thence westerly and diagonally through Pitkin avenue to Shepherd street; thence north on Shepherd street to Glenmore avenue; thence east on Glenmore avenue to Essex street; thence north on Essex street, beyond which his flight has not been traced.

Two months after the homicide the defendant was arrested in the borough of Brooklyn charged with the crime. The man who shot Parisi committed the crime of murder in the first degree. (Penal Law, § 1044.) The question of vital importance at the trial was whether the defendant is the man who committed the crime. When he was arrested the officer making the arrest said to him: "You are charged with shooting a man by the name of Parisi in East New York. * * * What have you got to say about it?" He replied: "I have nothing at all to say. I won't say anything until I see my lawyer." The officer asked him: "Where have you been all this time?" and he replied, "Right around." He was also questioned in his native language by an Italian officer. He was asked: "Why don't you tell us as to why and how you shot this man at East New York?" He replied: "I didn't shoot anybody. I don't know anything about it. I want to consult my lawyer." The officer asked, "Who is your lawyer?" and he replied, "I don't know yet." It does not appear that he at any time thereafter talked about the homicide.

On the day of the homicide and a little more than an hour before it occurred the deceased and the defendant met in a shoe shop on Glenmore avenue, which is next door to a barber shop. The defendant spoke about the barber, who is his cousin, and said that he is always sleepy, and they laughed. The shoemaker said that the barber "wanted to become a deputy." Parisi said, "He is an imbecile." The defendant inquired, "Why is he an imbecile?" and Parisi repeated, "He is an imbecile," and all laughed again.

The shoemaker was polishing the defendant's shoes and as Parisi was about to go out of the shop the defendant said, "Wait, I want to speak to you," and shortly thereafter they went out together. Parisi returned to the shop a little later and inquired, "Where is the barber's cousin?" The shoemaker replied that he did not know, and Parisi went away.

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The conversation at the shoemaker's was in a low tone of voice and it does not appear that there was any anger on the part of either person taking part therein. Nothing was shown at the trial tending to prove any threat or enmity by defendant against Parisi or any motive real or imaginary on his part to kill Parisi.

Nearly one-quarter of the block at the corner of Berriman street and Belmont avenue where the homicide occurred was at the time vacant. In such vacant lot two boys were playing and they heard a shot and looking around saw Parisi turn to face the man who fired the shot. The assailant was then very close to Parisi and he shot the second time, immediately upon which Parisi fell to the walk, whereupon the assailant turned and ran north on Berriman street as hereinbefore stated.

The two boys ran out of the lot, one Oelrich, thirteen years old, remained near Parisi. The other boy, Aschen-trup, fourteen years old, ran after the slayer. When the slayer was about half way along the first block another boy, Koehler, hearing shots, ran out of a house and joined in running after the fleeing man. A third boy on roller skates, Rollo, came around the corner of Belmont avenue at or about the time the shots were fired and he joined the other two in the chase. Near the corner of Shepherd street and Pitkin avenue was a boy, Stern, fourteen years old, on a bicycle, and he followed with the other three.

The boys followed the slayer until at the middle of the block on Glenmore avenue, between Shepherd and Essex streets. When the slayer reached that point he threw his pistol, which he had been carrying, into the grass by a junk shop. The boys stopped to pick up and examine the pistol and the slayer made his escape.

Aschen-trup, one of the boys that was in the lot at the time of the homicide, followed the slayer until he threw away his pistol. He testified that he did not see the man's face but that he did get a good look at his back;

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that the man had on a light gray suit and wore a black derby hat and was thin and short. He was unable to identify the defendant as the man who shot Parisi.

Koehler, the boy who ran out of his house only a few feet behind the fleeing man, testified that he had a good look at the man while he was running but that he did not see his face; that he had on a gray suit and a derby hat. He was unable to identify the defendant as the fleeing man.

Rollo, the boy on the roller skates, testified that the man was round shouldered and had a short neck; that he had on a light suit, but that he did not see his face. He was unable to identify the defendant as the man whom he followed.

Oelrich, who was about thirteen years of age and remained with the man who was shot, testified that he had a good look at the man's back but did not see his face. He further testified that the man had a short neck and broad shoulders, and that the defendant is the man who shot Parisi.

Stern, the boy on the bicycle, is the principal reliance of the prosecution. He testified that the man was short, broad shouldered, low necked, and had a small head. His description of the man, so far as his dress is concerned, is materially different from the others. While the others testified that the man had on a light suit and a derby hat, Stern testified that he had on a jacket, the color of which he does not remember, and that he wore a soft hat. He further testified that the defendant is the man that he followed and who threw away the revolver. He had never seen the man before and did not see the defendant until about three months after the homicide.

The defendant's wife testified that she remembers Monday, the 11th of September, by reason of certain occurrences which she detailed — that the defendant went to East New York on that day with his little boy and returned to his home with the boy at half-past four. The homicide occurred about one-quarter to five.

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Another witness testified that she remembers Monday, the 11th of September, by reason of certain occurrences which she detailed; that she called on the defendant's wife that afternoon; and that while she was making the call and between a quarter and half-past four the defendant came home with his little boy.

Who killed Parisi? Was the defendant the man who fired the shots and then ran, followed by the boys Aschentrup and others, until he threw away his revolver and escaped as stated?

The special effort of the prosecution was to identify the defendant as the slayer. Where a witness positively identifies a defendant as the man who committed a crime, the weight of the evidence of identification is for the jury unless it is incredible as a matter of law. (*People v. Trybus*, 219 N. Y. 18; *People v. Sanducci*, 195 N. Y. 361; *People v. Seidenshner*, 210 N. Y. 341.) The identity of the defendant as the person who committed the homicide was not in this case shown with sufficient certainty to preclude a reasonable possibility of mistake. Opinions expressed of the identity of a defendant particularly when they depend upon impressions obtained in haste and excitement should not be bolstered by self-serving performances of no probative value and yet strongly calculated to influence a jury of laymen, not versed in the rules of evidence. (*People v. Jung Hing*, 212 N. Y. 393, 401.)

After the defendant was arrested and nearly three months after the homicide, the boys Oelrich and Stern, with some others, were taken to a detective bureau and there shown seven or eight men, but one of whom, and he, the defendant, was an Italian. The men were placed in a line with their backs to the entrance of the room and the boys were brought in one at a time to look at them. Oelrich and Stern on request, it is alleged, pointed out the defendant—Oelrich as the one that he saw committing the homicide and running away therefrom and Stern

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as the man he followed on his bicycle and who threw away his revolver.

Evidence was offered by the prosecution of what occurred at the detective bureau. The first of the evidence so received was subject to objection and exception. It was undeniably offered and received for the purpose of bolstering up the testimony already given at the trial by Oelrich and Stern in identification of the defendant.

Counsel for the defendant made use of it in his closing address to the jury. The court in charging the jury among other things said: "And the boy who saw the second shot * * * says that he at that time made such an observation of some physical characteristics of the defendant as later enabled him to *pick him out of a line of men at the police detective headquarters.*" And, again, "the real question with which you wrestle is the value of the testimony of the Stern boy who claims he saw the defendant's face and subsequently *picked him out at the detective headquarters*, and the value of the testimony of the boy Oelrich who gave you, as I stated, some physical characteristics said to apply to, or to fit the defendant and who also picked out a man whom he regarded as bearing those characteristics who was *lined up with others at the police detective headquarters or bureau, the person so picked out being this defendant.*"

In the *Jung Hing Case* (*supra*) the effect of such testimony was considered by this court. In that case the defendant was placed in line with thirteen or fourteen other Chinamen and it was said "the women * * * were brought in singly, and each in turn placed her hand on the defendant as a token of her identification of the defendant as the man who shot the deceased. This was proper enough for the preliminary purpose of determining in the police station whether any one of the Chinamen in the line should be held for examination as the probable assailant of the deceased. It was quite another thing, however, to prove *de novo*, on the trial under

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review, that the witnesses who here testified to the defendant's identity had given similar testimony in the police station. This was, in effect, but a corroboration of these witnesses by their own previous declarations or acts. * * * The evidence of what occurred in the police station was no different in principle than though the same witnesses had been allowed to state what their testimony on this subject had been on the defendant's first trial, where the jury disagreed. It was nothing more nor less than a bolstering of the present testimony of these witnesses by showing that on a prior occasion they said or did the same thing." (p. 400.)

The claim of the respondent that this case can be distinguished from the *Jung Hing* case cannot be sustained. The admission of the self-serving declarations of the witnesses Oelrich and Stern as to their identification of the defendant at the detective bureau was prejudicial to the defendant.

The court in charging the jury further said: "Motive plays absolutely no part in your deliberations. The prosecution was not required to show you any motive for the crime. In fact the prosecution is never bound to prove a motive for the commission of a crime. Motive furnishes corroboration in a case depending upon circumstantial evidence, but that is not this case. This case is one of direct evidence that this defendant shot or else that the man who did the shooting is not in this court room so far as we know."

Proof of motive is never indispensable to conviction for crime. (*Pointer v. U. S.*, 151 U. S. 396.) Where testimony is presented on a trial which satisfies a jury that the defendant has committed a crime, it is sufficient for conviction although no motive therefor has been shown. (*People v. Feigenbaum*, 148 N. Y. 636.) In determining the guilt or innocence of a defendant, however, the question of motive is always to be considered by the jury in their deliberations. It was error, therefore, for the court to

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charge the jury that "Motive plays absolutely no part in your deliberations."

We cannot say, under section 542 of the Code of Criminal Procedure, in this case that the errors occurring on the trial did not affect the defendant's substantial rights.

The judgment of conviction should be reversed and a new trial ordered.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, CARDOZO and McLAUGHLIN, JJ., concur.

Judgment of conviction reversed, etc.

CITIZENS BREWING CORPORATION, Appellant, *v.* JOHN LIGHTHALL et al., Respondents, Impleaded with Others.

Liquor tax certificate — assignment of certificate — abandonment of premises for which such certificate was granted and application to have certificate transferred to other premises — when such transfer improperly denied because certificate for premises abandoned had been issued to a new tenant thereof.

A liquor tax certificate authorizing traffic in liquors at a place therein named passed by assignment with all the rights appertaining thereto to plaintiff, and the original holder of the certificate surrendered possession of the premises on which the business was carried on to his landlord. The next day a lessee of the premises obtained from the proper authorities a certificate to traffic in liquor therein. The plaintiff on the same day gave notice of the abandonment of the right there to traffic in liquors, and at the same time presented the necessary papers to have the original certificate transferred to other specified premises in the same city, which application was denied by the excise department on the ground that a certificate had been granted the lessee of the premises in question. Plaintiff brings this action in equity to revoke and cancel the certificate issued to the tenant who succeeded to the occupancy of the premises. *Held*, that the action can be maintained; that the certificate issued to the tenant had no validity, and that plaintiff's application to transfer the certificate issued to plaintiff's assignor

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should have been granted. (*Liquor Tax Law* [Cons. Laws, ch. 34], § 8, subd. 9, amd. L. 1911, ch. 298; § 27, subd. 2, amd. L. 1910, ch. 503.) (*Matter of Farley*, 170 App. Div. 400; aff'd., 220 N. Y. 663, followed; *People ex rel. Hope v. Masterman*, 209 N. Y. 182, explained.)

Citizens Brewing Corp. v. Lighthall, 177 App. Div. 18, reversed.

(Argued April 19, 1917; decided June 5, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 6, 1917, which reversed an order of Special Term granting a motion for an injunction *pendente lite* and denied said motion.

The following questions were certified: "1. Could the plaintiff, as assignee of Ludwig Jagielo, the holder of the certificate in question, holding the assignment merely as collateral security for indebtedness, surrender (under the instrument of assignment) said liquor tax certificate, and on behalf of Jagielo abandon the traffic in liquors at 38½ Oneida street, in the city of Cohoes, and petition for the transfer of said liquor tax certificate to other premises in said city, and to another person?

"2. Are the rights and privileges given under section 25 of the Liquor Tax Law, as amended by chapter 407 of the Laws of 1911, and subdivision 9 of section 8 of the Liquor Tax Law, personal to the holder of the certificate or may they be exercised by a person to whom the holder has assigned said certificate as collateral security, giving him the power to abandon traffic in said premises and to petition as provided for by said law?

"3. Did the defendant John Lighthall have the right to traffic in liquors under the certificate issued to him at the premises 38½ Oneida street, city of Cohoes?

"4. Did the attempted abandonment made by the plaintiff of the traffic in liquors under the Jagielo certificate affect the rights of the defendant John Lighthall?

"5. Were any rights vested in the defendant John Lighthall by reason of the issuance of the certificate to him?

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"6. Could the plaintiff abandon the right to traffic in liquors to the prejudice of the rights of the owners or tenants of the premises?

"7. Could the plaintiff abandon the right to traffic in liquors to the prejudice of the rights of the defendant Lighthall?

"8. Is the plaintiff, on the papers herein, entitled to an injunction restraining the defendant Lighthall from trafficking in liquors and commanding the defendants Lighthall and Penrose & McEniry to deliver aid Liquor Tax Certificate to the clerk of the court to be held and impounded by said clerk during the pendency of the action?"

The facts, so far as material, are stated in the opinion.

Henry A. Rubino and *Howard Hendrickson* for appellant. No authority existed for the issuance of the second certificate to Lighthall and he could gain no right of traffic while the first certificate was outstanding, uncancelled and unrevoked. (*People ex rel. Young v. Shults*, 167 App. Div. 34.) Possession of the premises where the traffic in liquors is sought to be abandoned has nothing to do with the right to abandon. (*Matter of Marshall*, 97 Misc. Rep. 492; *Brunner v. Farley*, 93 Misc. Rep. 681; *Matter of Farley*, 154 App. Div. 286; *Matter of Farley*, 170 App. Div. 404.)

Walter H. Wertime for respondent. Certificate No. 8303 was properly issued to the defendant John Light-hall. (*People ex rel. Hope v. Masterman*, 209 N. Y. 182.)

H. B. Chase and *Harry D. Sanders* for state department of excise. The plaintiff, as assignee of Ludwig Jagielo, the holder of the certificate in question, holding the assignment merely as collateral security for indebtedness, could not surrender (under the instrument of assignment) said liquor tax certificate, and on behalf of Jagielo

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abandon the traffic in liquors at 38½ Oneida street, in the city of Cohoes, and petition for the transfer of said liquor tax certificate to other premises in said city, and to another person. (*Matter of Lyman*, 59 App. Div. 222; *Matter of Mitchell*, 41 App. Div. 271.) The defendant John Lighthall had the right to traffic in liquors under the certificate issued to him at the premises 38½ Oneida street, city of Cohoes. (*People ex rel. Hope v. Masterman*, 156 App. Div. 450.) The plaintiff, on the papers herein, is not entitled to an injunction restraining the defendant Lighthall from trafficking in liquors and commanding the defendants Lighthall and Penrose & McEniry to deliver said liquor tax certificate to the clerk of the court, to be held and impounded by said clerk during the pendency of the action. (*People ex rel. Hope v. Masterman*, 209 N. Y. 182.)

McLAUGHLIN, J. This appeal is by permission from an order of the Appellate Division, third department, reversing, by a divided court, an injunction *pendente lite* and certifying certain questions.

The action is in equity, to enjoin respondent Lighthall from trafficking in liquors under certificate No. 8303 in premises located at 38½ Oneida street, in the city of Cohoes, county of Albany, during the pendency of the action, to revoke and cancel such certificate, and for other relief.

A determination of the question presented by the appeal necessitates a statement of the facts involved in or connected with the issuance of the certificate to Lighthall. On the 30th of September, 1916, liquor tax certificate No. 8239 was issued to one Ludwig Jagielo, authorizing him to traffic in liquors at No. 38½ Oneida street for one year from October 1, 1916. Jagielo assigned the certificate as collateral security for the payment of money loaned to him by Conway Brothers Brewing & Malting Co., and at the same time he gave to it an irrevocable

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power of attorney authorizing such corporation, or its assigns, to sell or surrender the certificate or transfer it from 38½ Oneida street to other premises. The corporation thereafter assigned all its rights to the plaintiff in this action. Jagielo trafficked in liquors at the place named until the 31st of October — just a month from the time the certificate was issued to him — and at four o'clock in the afternoon of that day he delivered to the plaintiff his liquor tax certificate and surrendered possession of the premises to his landlord. The premises were, after such surrender, leased to the respondent Lighthall, who, at 9:45 on the following morning, made an application for, and obtained from the proper authorities, a certificate to traffic in liquors therein. A few minutes thereafter the plaintiff gave notice of abandonment of the right there to traffic in liquors, and at the same time presented the necessary papers to have the certificate issued to Jagielo transferred to No. 4 Oneida street. The application to transfer was denied on the ground that there was then outstanding the certificate just issued to Lighthall.

If the certificate were legally issued to Lighthall, then the application of plaintiff to transfer was properly denied, because, if granted, the number of licenses issued in the locality would have exceeded the ratio of population provided in the statute, and to determine the legality of such certificate this action was brought.

I am of the opinion that the certificate issued to Lighthall had no validity, and the plaintiff's application to transfer the certificate issued to Jagielo being properly made, should have been granted. Such certificate was then in full force and effect, and so long as it had not been transferred from 38½ Oneida street, no certificate could be issued to another legally authorizing him to traffic in liquors at that place. The fact that Jagielo had surrendered possession of the premises and the certificate issued to him had been removed therefrom, in no

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way changed the situation. The plaintiff, as the holder of the Jagielo certificate, could transfer, notwithstanding the fact that he was not in possession (*Matter of Farley*, 170 App. Div. 400; affd., 220 N. Y. 663) and it had sixty days within which to make such transfer effective. (Liquor Tax Law [Cons. Laws, ch. 34], subdiv. 9, § 8, as amended by chap. 298 of the Laws of 1911.) The statute referred to provides, among other things: "Provided, however, that at any time during the unexpired term of any liquor tax certificate issued for traffic in liquors under the provisions of subdivision 1 of this section in any premises in which such traffic may lawfully be carried on, a notice stating that such traffic in liquors is abandoned at the premises named in such certificate may be filed with the county treasurer or special deputy commissioner of excise of the county or borough in which the certificated premises are located, which notice shall also particularly describe some other premises in which it is intended to carry on such traffic, which premises shall be situated in the same city, borough, village or town as that in which the abandoned premises are located. * * * But in any case such notice shall be null and void unless within sixty days from the filing thereof such traffic in liquors shall be lawfully carried on at the premises described in such notice as the premises in which it is intended to carry on such traffic, and continued thereat for a period of not less than sixty days, and the filing of a notice that becomes null and void shall not be deemed an abandonment of the traffic at the premises described in such liquor tax certificate. After the filing of such notice as aforesaid, the prohibition herein contained shall not apply to the premises described in such notice as the premises in which it is intended to carry on such traffic, provided that an application for a certificate to carry on such traffic in liquors thereat shall be made in due form to the proper officer, within sixty days from the filing of such notice, and provided further that such traffic is continuously thereafter carried on at

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said premises for a period not less than sixty days. Except in case where such notice becomes null and void as aforesaid, no liquor tax certificate for traffic in liquors under the provisions of subdivision 1 of this section shall thereafter be issued for, and it shall be unlawful to so traffic in liquors in the premises described in such notice as the premises in which the traffic in liquors has been abandoned, unless there shall subsequently be filed another notice of abandonment, in the manner herein provided, which notice shall describe such first abandoned premises as the premises in which it is intended to again carry on such traffic in liquors."

By the provision of the statute quoted it will be observed that the holder of a liquor tax certificate may, at any time during the unexpired term of the same, file with the proper officer a notice of abandonment to traffic in liquors at premises described in the certificate, naming others in the same city, village or town in which it is intended to carry on the traffic. It also specifically gives to the holder of the certificate who has filed such notice of abandonment sixty days within which to apply for a transfer of the certificate to other premises described in the notice, and during that time prohibits the issuance of any liquor tax certificate under the provisions of subdivision 1 of section 8 for trafficking in liquors at the premises described in such notice as those in which such traffic has been abandoned.

On November 1, when the plaintiff applied for the transfer of the certificate issued to Jagiolo, the term for which it was issued had not expired, but, as heretofore said, was in full force and effect. The plaintiff then, as the holder of that certificate, had a legal right to abandon liquor traffic at 38½ Oneida street and designate other premises in the same city as the place where it was intended such traffic would thereafter be carried on. The notice of abandonment was in proper form, as were the papers necessary for a transfer of the certificate.

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For a period of sixty days after the notice of abandonment was given—unless the transfer were made in the meantime—no other certificate could be legally issued permitting traffic in liquors at 38½ Oneida street, and any traffic at such place during such period was in direct violation of law. The issuance of the certificate to Lighthall was unauthorized, contrary to the expressed provision of the statute, and the certificate, therefore, invalid for any purpose. The one issued to Jagielo being valid and in force, there was no legal justification for denying the application to transfer. Plaintiff had a legal right to make the transfer and a legal right cannot be destroyed by the illegal or unauthorized act of another. When plaintiff's application was made it was the duty of the deputy excise commissioner—plaintiff acting strictly within its legal rights—to have granted the transfer, and if, in his opinion, the certificate illegally issued to Lighthall prevented the transfer, then he should have exercised the power which he had under subdivision 2 of section 27 of the Liquor Tax Law, as amended by chapter 503 of the Laws of 1910. It is there provided that "At any time after a liquor tax certificate has been issued to any person * * * said liquor tax certificate may be revoked and cancelled * * * if the holder of said certificate was not for any reason entitled to receive or hold the same, or to traffic in liquors."

It cannot be that the statute ever contemplated that a public official, clothed with power to issue liquor tax certificates, should, when an application is made, grant the same, even though in doing so the statute is violated by the number of licenses exceeding the ratio provided. Nor can it be that the statute ever contemplated that such public officer, acting for and on behalf of the state, should accept money for a privilege, well knowing that it does not exist and cannot be exercised. The official who issued the Lighthall certificate knew that he had no right to perform such act, because in doing so the number of

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certificates exceeded the statutory ratio. He also knew when he accepted the license fee from Lighthall that his privilege of trafficking in liquors at the place named did not exist. Having this knowledge it was his duty in the first instance to refuse to issue such license until the barrier caused by the Jagielo certificate had been removed. And having neglected to perform his duty in this respect, then an additional duty was imposed upon him to have canceled and revoked the Lighthall certificate as soon as he ascertained that its existence interfered with the rights of the holder of the Jagielo certificate.

The view thus expressed is sustained in part at least by the following authorities: *People ex rel. Young v. Shults* (167 App. Div. 33; affd. on op. below, 218 N. Y. 626); *Matter of Farley (Vorndran Certificate)* (*supra*); *Krueger v. Broadway Brewing & Malting Co.* (215 N. Y. 722); *Zobrest v. East Buffalo Brewing Co.* (210 N. Y. 626); *Chilcott v. Broadway Brewing & Malting Co.* (Id. 633); *Matter of Farley (Bales Certificate)* (154 App. Div. 282; affd. on op. below, 208 N. Y. 595), and *Matter of Green (Di Iorio Certificate)* (171 App. Div. 583).

That an action can be maintained in equity for the relief here sought is sustained by *People ex rel. Hope v. Masterman* (209 N. Y. 182) in which the statement is made that if the owner of a certificate desires to transfer the business to another place he can maintain an action in equity to cancel another certificate if it interferes with the desired change.

But it is strenuously urged that the decision in the *Hope* case justified the issuance of the certificate to Light-hall. I do not think the decision in that case is susceptible of the construction thus put upon it. There, one Force applied for and received a certificate to traffic in liquors on certain premises in the town of Corning. When the application was made and the certificate issued, Force did not have a lease of, or any interest in, the premises,

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although he had been negotiating for a lease, which negotiations, however, thereafter fell through. Afterwards, Hope secured a lease of the premises and applied for a liquor tax certificate which was refused because there had already been one issued to Force. Thereupon Hope instituted certiorari proceedings to review the action of the county treasurer in refusing him a certificate. An order was made therein directing the county treasurer to issue a certificate to Hope, which was affirmed by the Appellate Division (156 App. Div. 450) and on appeal to this court also affirmed (209 N. Y. 182). It is true that in the opinion delivered in this court an observation was made -- not necessary to the decision -- to the effect that if there were several certificates outstanding for the same premises a transfer ought not to be made unless all of the certificates were surrendered and the sale of liquor in the premises from which the transfer was made, abandoned. This observation, of course, had reference only to the particular facts involved in the case there considered. That question was simply whether Hope was entitled to a certificate, notwithstanding the fact that the Force certificate was outstanding and unrevoked, and the court held that he was. No question of transfer was involved. The rule as to transfers there laid down is a proper one as applied to that case, but it must be borne in mind that the facts in that case differ from those in the case now before us in one very essential particular. There were there two valid outstanding certificates for the same premises. Neither, so far as appears, was open to attack, and the learned judge writing the opinion must have had that in view. In the present case there is but one valid certificate outstanding, viz., the one issued to Jagielo. The one issued to Lighthall has no validity. It was issued in disregard of the statute expressly forbidding its issuance. This clearly distinguishes this case from the *Hope* case.

The plaintiff had a right to abandon 38½ Oneida street

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and transfer the certificate to 4 Oneida street, and it cannot be deprived of that right by an illegal and unauthorized act of a public official. To hold otherwise would be, in effect, to say that a public official, without any authority, could deprive one holding a liquor tax certificate of the right which the statute gives him to transfer by issuing a second certificate for the same premises. It does not require argument to demonstrate that the *Hope* case does not so hold.

The order appealed from, therefore, should be reversed and the order of the Special Term affirmed with costs in this court and the Appellate Division. The first and eighth questions should be answered in the affirmative, the third in the negative, and it is unnecessary to answer the second, fourth, fifth, sixth and seventh.

HISCOCK, Ch. J., CHASE, POUND, and ANDREWS, JJ., concur; HOGAN, J., dissents; CARDENZO, J., not voting.

Order reversed, etc.

In the Matter of JACOB ROUSS, an Attorney, Appellant.
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Respondent.

Attorney at law — proceedings for disbarment of an attorney — such proceeding not a criminal prosecution for the imposition of a penalty or forfeiture — attorney not immune from disbarment because proceeding therefor is based upon testimony on a trial in substance confessing the acts for which he is liable to disbarment — constitutional provision that no person shall be compelled to testify against himself not applicable in such proceeding.

1. Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards, and whenever the condition is broken, the privilege is lost.

2. The State Constitution (Art. 1, § 6) says that no person shall "be compelled in any criminal case to be a witness against him-

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self." But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime. A proceeding looking to disbarment is not a criminal case.

8. Disbarment is not a penalty or forfeiture within the meaning of the statute (Penal Law, § 584) providing that no person shall be excused from testifying on any trial for a violation of article 54 of that law (which defines and punishes conspiracy), upon the ground that the testimony required of him may tend to subject him to a penalty or forfeiture, and providing further that no person shall be subjected to any penalty or forfeiture on account of anything concerning which he may so testify, and that no testimony so given shall be received against him upon any criminal investigation, proceeding or trial. Hence, an attorney is not immune from discipline by reason of having given testimony on a trial, which was in substance a confession of the acts for which he is liable to disbarment. (*Matter of Kaffenburgh*, 188 N. Y. 49, distinguished.)

Matter of Rouss, 169 App. Div. 629, affirmed.

(Argued April 23, 1917; decided June 5, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 20, 1915, disbarring the appellant from practice as an attorney and counselor at law.

The facts, so far as material, are stated in the opinion.

Charles E. Le Barbier, Walter H. Pollak, Charles O. Maas and H. H. Nordlinger for appellant. An attorney's loss of his office is a penalty or forfeiture. (*Matter of Kaffenburgh*, 188 N. Y. 49; *People ex rel. Schauwecker v. Green*, 96 N. Y. 249; *Matter of an Attorney*, 83 N. Y. 164; *Matter of Robinson*, 140 App. Div. 329; *Matter of Lauterbach*, 169 App. Div. 534; *Matter of Feuchtwanger*, 139 App. Div. 36; *Matter of Hardenbrook*, 135 App. Div. 634; *Matter of Rothschild*, 140 App. Div. 583; *Matter of Montegriffo*, 171 App. Div. 933; *Matter of Evans*, 169 App. Div. 502; *Matter of Lampke*, 165 App. Div. 899; *Matter of Smith*, 161 App. Div. 638; *Matter of Avrutis*, 161 App. Div. 549; *Matter of Herbst*, 158 App. Div. 601.) A different construction should not be given to the words "penalty or forfeiture" as used in

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the Code of Civil Procedure and as used in the Penal Law. The purpose of the Penal Law provision was to facilitate the administration of justice. Only if the statutory immunity is as broad as the ancient right can that purpose be effected. If the immunity provision is to have a narrower construction it will in many cases fail of its purpose altogether. For the witness if not given complete immunity would still invoke his statutory and common-law right. (*Matter of Cooper*, 22 N. Y. 67; *State v. Degrass*, 72 Tex. 242; *Bergerow v. Parker*, 4 Cal. App. 169; *People ex rel. Beaman v. Feitner*, 168 N. Y. 360; *Brown v. Walker*, 161 U. S. 591.)

George W. Wickersham and *Einar Chrystie* for respondent. Section 584 of the Penal Law was not intended and cannot be construed to render an attorney at law immune from the discipline by the Appellate Division of the Supreme Court when he has been found guilty of professional misconduct. (*Nelson v. Comm.*, 128 Ky. 779; *Ex parte Wall*, 107 U. S. 265; *People v. Burton*, 39 Colo. 164; *People v. George*, 186 Ill. 122.) A disbarment proceeding is in no sense a criminal proceeding. (*Matter of Randel*, 158 N. Y. 216.) When an attorney proves faithless to the trust imposed in him the courts have always had the power by disbarment proceedings, not to punish the faithless attorney, but to uphold the honor of the profession and to protect the public in its dealings with its members. (*Matter of Thatcher*, 190 Fed. Rep. 969; *Matter of Peterson*, 3 Paige, 510; *Matter of Wellcome*, 23 Mont. 450; *Matter of Mills*, 1 Mich. 392.)

CARDOZO, J. In 1912 the appellant, Jacob Rouss, was the attorney for one Eugene Fox. Fox, a member of the police force in the city of New York, had been brought before a magistrate on the charge of collecting bribes from the keeper of a disorderly house. The keeper of the house,

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one George A. Sipp, had been served with a subpœna, or at least there had been to his knowledge an attempt to serve him. Rouss and Sipp's attorney entered into an arrangement that Sipp for a money consideration would keep without the state. The money was paid; Sipp fulfilled his bargain; and Fox was discharged. Indictments were later found against five inspectors of police for conspiracy to obstruct justice through the suppression of Sipp's testimony. On the trial of those indictments, Rouss was a witness for the People. His testimony as there given is in substance a confession of guilt. Charges of professional misconduct were afterward preferred against him. To these charges, he makes answer that he is immune from discipline by force of section 584 of the Penal Law, which says that "no person shall be excused from attending and testifying, or producing any books, papers or other documents before any court, magistrate or referee, upon any investigation, proceeding or trial, for a violation of any of the provisions of this article, [Art. 54 defining and punishing conspiracy], upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial." The question is whether disbarment is a penalty or forfeiture within the meaning of that statute.

Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards (*Selling v. Radford*, 243 U. S. 46; *Matter of Durant*, 80 Conn. 140, 147). Whenever the condition is

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broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment (*Ex parte Wall*, 107 U. S. 265; *Matter of Randall*, 11 Allen, 473, 480; *Matter of Randel*, 158 N. Y. 216; *Boston Bar Assn. v. Casey*, 211 Mass. 187, 192; *Matter of Durant, supra*). "The question is," said Lord MANSFIELD, "whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion" (*Ex parte Brounsall*, Cowp. 829). "It is not," he continued, "by way of punishment; but the court, on such cases, exercise their discretion whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not." This ruling was announced after consultation with all the judges, "as it is for the dignity of the profession that a solemn opinion should be given." On that high plane the jurisdiction was thus early placed, and in that high spirit it has been exercised. Even pardon will not elude it. Pardon blots out the offense, and all its penalties, forfeitures and sentences; but the power to disbar remains (*Matter of an Attorney*, 86 N. Y. 563). We do not need to inquire now whether the power is so essential and inherent that the legislature may not take it away (*State ex rel. Wood v. Raynolds*, 158 Pac. Rep. 413, and cases there cited). At least we will not hold it to have been taken away by words of doubtful meaning. We will not declare, unless driven to it by sheer necessity, that a confessed criminal has been intrenched by the very confession of his guilt beyond the power of removal.

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The problem before us, let it be recalled, is one solely of statutory construction. There is no question of constitutional right. The Constitution says that no person "shall be compelled in any criminal case to be a witness against himself" (Const. art. 1, sec. 6). A proceeding looking to disbarment is not a criminal case (*Matter of Randel, supra*). We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime. There may be a broader privilege by statute or at common law. If that is so, the Constitution does not assure its preservation (*Perrine v. Striker*, 7 Paige, 598, 602; *People ex rel. Hackley v. Kelly*, 24 N. Y. 74, 82, 83; *Counselman v. Hitchcock*, 142 U. S. 547, 562). Where speech will expose to penalties unrelated to crime, the legislature may withdraw the privilege of silence. It has done so in the past (*Perrine v. Striker, supra*; *Robinson v. Smith*, 3 Paige, 222, 231). It may do so again.

We think that section 584 of the Penal Law was designed to give an immunity as broad as the constitutional privilege, and no broader (*State v. Jack*, 69 Kan. 387). Its origin is not doubtful. The rule has always been that disclosure of crimes may be compelled if there is adequate immunity. The difficulty has been to know when the immunity is adequate. *People ex rel. Hackley v. Kelly* (24 N. Y. 74, decided in 1861) held it to be a compliance with the Constitution that the testimony of the witness could not be used, though he was still subject to prosecution through the testimony of others. *People ex rel. Lewisohn v. O'Brien* (176 N. Y. 253, 268, decided in 1903) overruled *People ex rel. Hackley v. Kelly*, followed *Counselman v. Hitchcock* (142 U. S. 547), and closed with the suggestion that "if the interests of the People are deemed to require it, it is, of course, quite competent, and

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proper, for the legislative body to provide for an exemption of the witness from liability to prosecution, as broad in its effect as is the constitutional privilege." Following that suggestion, section 584 of the Penal Law and like statutes (see, *e. g.*, Penal Law, secs. 380 and 381) were enacted. Their purpose was to make the Constitution and the statute coextensive and consistent. Penalties and forfeitures, as the words are used in this exemption, are penalties and forfeitures imposed upon an offender as part of the punishment of his crime (*U. S. v. Reisinger*, 128 U. S. 398; *Boyd v. U. S.*, 116 U. S. 616; *Lees v. U. S.*, 150 U. S. 476; *U. S. v. Regan*, 232 U. S. 37; *La Bourgoigne*, 104 Fed. Rep. 823). The statute is a grant of amnesty. The witness is to have the same protection as if he had received a pardon (*Brown v. Walker*, 161 U. S. 591, 599; *Burdick v. U. S.*, 236 U. S. 79). It is inconceivable that the intention was to give him even more. But a pardon, as we have seen, though it blots out penalties and forfeitures, does not render the courts impotent to protect their honor by disbarment (*Matter of an Attorney, supra*). The legislature cannot have believed that in the interpretation of a grant of amnesty exemption from penalties and forfeitures would receive a broader meaning. Disbarment, therefore, is not within the range of the exemption. That was the ruling in *Matter of Biggers* (24 Okla. 842; *S. C.*, 25 L. R. A. [N. S.] 622) in circumstances not to be distinguished from those before us. It is a ruling well sustained by precedent and reason.

There are two other lines of argument which by different methods of approach lead to the same goal. One argument is purely verbal. It points to the concluding words of the statute: "no testimony so given or produced shall be received against him, upon any *criminal* investigation, proceeding or trial" (Penal L. § 584). The use of the word "criminal" helps to explain and characterize the kinds of penalties and forfeitures within the range of the exemption. But there is another argument more

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significant than any verbal one. The argument is that unless the immunity is limited to criminal penalties and criminal forfeitures, the state has promised more than it can perform, and the whole statute becomes illusory. There was an ancient rule in chancery that discovery would never be granted in aid of an action for a forfeiture (*Earl of Mexborough v. Whitwood Urban District Council* [L. R. 1897] 2 Q. B. 111, 118; *Jones v. Jones* [L. R.] 22 Q. B. D. 425; *Martin v. Treacher* [L. R.] 16 Q. B. D. 507; *Lansing v. Pine*, 4 Paige, 639; *Perrine v. Striker*, 7 Paige, 598, 601; *Abernethy v. Society of the Church of the Puritans*, 3 Daly, 1, 8, 9). It was merely a branch of the broader principle that forfeitures are abhorred in equity. Cases which illustrate its application are cited by counsel for the appellant: *Honeywood v. Selwin* (3 Atk. 276), where the defendant, being a member of Parliament, was held privileged from discovery because by statute the acceptance of other office vacated a seat in Parliament (Wigmore, section 2256 [note 9]); *Firebrass's Case* (2 Salk. 550), where the chief ranger of Enfield Chase was held privileged from discovery which might lead to the forfeiture of his place; and other cases where discovery would have shown a violation of the statute against simony. The precedents are collated by Wigmore (section 2256). We are asked to hold that forfeitures within the meaning of the rule in equity and forfeitures within the meaning of this act of amnesty are the same thing. But the consequences of such a holding would be impossible. The argument proves too much. A forfeiture as viewed by courts of chancery had a range and breadth which no exemption granted by the state could rival. One illustration among many will suffice. The loss of an estate for breach of a condition subsequent was a forfeiture within the rule in equity (*Earl of Mexborough v. Whitwood, etc.*; *Jones v. Jones*; *Martin v. Treacher*; *Abernethy v. Church, supra*). Nice distinctions were drawn in early cases between the determination of the estate by act of the party himself and its

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determination by some event not subject to his control. Nice distinctions were also drawn between conditions and conditional limitations. A decision by Chancellor KENT in *Livingston v. Tompkins* (4 Johns. Ch. 415, 420) swept these distinctions aside; the estate, however lost, was forfeited; and the forfeiture would find no aid in equity. That was not a rule of evidence. It was one of the principles regulating the exercise of chancery jurisdiction (*Livingston v. Tompkins, supra*).

Side by side with this principle of chancery jurisdiction there grew up a rule of evidence — a privilege of witnesses — which was enforced in courts of law. Its origin is obscure. At one time the law of evidence may have known no privilege at all (Wigmore, section 2250). When the privilege first came, its scope was uncertain. There was doubt, indeed, whether a witness could be compelled to answer if by so doing he would subject himself to a civil action, or charge himself with a debt (2 Taylor on Ev. sec. 1463; Wigmore on Ev. sections 2223, 2254). Discussion of the subject in *Lord Melville's* case led to the statute 46 Geo. 3, ch. 37. That statute is the precursor of section 837 of our own Code (Code Civ. Pro. § 837). It established the rule that the witness must testify unless the answer will tend to accuse him of a crime or expose him to a penalty or forfeiture. The penalties and forfeitures, however, were not defined. Whether they are as broad as penalties and forfeitures within the meaning of the rule in equity is still an open question, and one not now before us. Chief Justice COCKBURN expressed his doubts upon that subject in *Pye v. Butterfield* (5 B. & S. 829, 836). (See also Wigmore, section 2256.) But the thing which concerns us now is not the meaning of the statutory privileges of silence where that privilege survives. We are concerned with the extent of the exemption where the privilege has been taken away. The forfeitures and penalties which the state undertakes to remit cannot be the forfeitures and penalties which equity

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refused to aid; and this for the simple reason that the state would be powerless to remit them effectively. Again, a single illustration serves our purpose. The witness on a trial for conspiracy who shows that he has violated a condition of his lease, has thereby exposed himself to forfeiture of his estate at the election of his landlord. The forfeiture, however, is one which no act of amnesty can waive. We cannot suppose that the legislature attempted to waive it. We cannot impute to the lawmakers a futile and frivolous intent. The alternative is to hold that the forfeitures remitted are forfeitures imposed by the sovereign power as part of the punishment of crime. If some other construction is possible, there is none so reasonable and obvious. Punishment of crime may for this purpose include the recovery from the offender of penalties and forfeitures through the form of civil actions (*U. S. v. Regan, supra*, at p. 50; *Hepner v. U. S.*, 213 U. S. 103, 111). But punishment there must be.

Our decision in *Matter of Kaffenburgh* (188 N. Y. 49) is pressed upon us as controlling. But we think it is inapplicable. Kaffenburgh had refused to answer when called as a witness upon the trial of an indictment for conspiracy. He put his refusal on the ground that the answer would tend to criminate him. That was before the enactment of section 584 of the Penal Law. Disbarment proceedings were afterwards begun, and the charge was made that the refusal to answer was professional misconduct. That charge was not sustained either in the Appellate Division or in this court. Disbarment was ordered, but on other grounds. Much that was said was in reality unnecessary to the decision. There was no occasion to determine whether Kaffenburgh's refusal to testify was proper because it tended to expose him to a forfeiture of office. He had placed his refusal on the ground of a tendency to criminate him, and that of itself was sufficient to sustain him. We may assume, how-

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ever, the binding force of the opinion in all its parts. If we give it that force, it does not reach this case. It defines at the utmost the scope of section 587 of the Code of Civil Procedure. It measures the statutory privilege when no part of the privilege has been withdrawn. In the case at hand, the privilege has been withdrawn. It has been withdrawn by section 584 of the Penal Law. In return for the loss of the privilege there has been the grant of a new exemption. It is that exemption and not the vanished privilege, which is now to be defined. *Matter of Kaffenburgh* did not decide that disbarment for professional misconduct is a penalty or forfeiture within the meaning of an act of amnesty (*Matter of an Attorney*, 86 N. Y. 563). If it did, we could not follow it.

Consequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided. The claim of immunity from disbarment cannot survive the application of that test. If the exemption protects lawyers, it must equally protect physicians, whose licenses have long been subject to revocation for misconduct (Public Health Law, § 170; Consol. Laws, ch. 45; 1 R. S. 452, § 3; *Matter of Smith*, 10 Wend. 449; *Allinson v. Gen. Council of Medical Education* [I. R. 1894] 1 Q. B. 750). Two great and honorable professions have in that view been denied the right to purify their membership and vindicate their honor. The charlatan and rogue may assume to heal the sick. The knave and criminal may pose as a minister of justice. Such things cannot have been intended, and will not be allowed.

The order of disbarment should be affirmed.

HISCOCK, Ch. J., CHASE, McLAUGHLIN, CRANE and ANDREWS, JJ., concur; HOGAN, J., not voting.

Order affirmed.

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JOHN M. MCGRATH, Appellant, *v.* CARNEGIE TRUST COMPANY et al., Respondents.

Subrogation—right thereto does not accrue until whole debt has been discharged by person seeking to be subrogated.

1. The equity of subrogation does not arise until the whole debt has been discharged. Hence a creditor may not be required to surrender any part of his collateral till payment has been made in full.

2. The trust company, defendant, agreed to use certain funds received by it from plaintiff's assignor for the purchase of stocks which it was to hold in trust as collateral to a loan made by such assignor to the makers of the notes. The trust company did not buy the stocks and is now insolvent. The makers of the notes have paid plaintiff part of the amount due thereon. This action has been brought to determine the indebtedness on which the plaintiff's dividend must be computed in the distribution of the defendant's assets. *Held*, that the defendant has no concern with the payments made by the makers of the notes, and hence the plaintiff is entitled to have the dividends computed on the whole amount of the trust deposit held by defendant.

McGrath v. Carnegie Trust Co., 171 App. Div. 143, reversed.

(Argued May 7, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 25, 1916, affirming a judgment in favor of plaintiff for part only of the relief demanded entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry B. Closson for appellant. Plaintiff was entitled to judgment against Carnegie Trust Company for the full amount of the trust fund, to wit, \$140,000. (*Madison Square Bank v. Pierce*, 137 N. Y. 444; *Culliford v. Walzer*, 13 Misc. Rep. 493; *Matter of Heyman*, 95 Fed. Rep. 800; *Hanover National Bank v. American Dock, etc., Co.*, 14 App. Div. 255; 43 N. Y. Supp. 544; 8 Corpus Juris. 822, 823; 1 Abbott's Cyclo. Digest, 875,

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876; *Hills v. Flynn*, 161 App. Div. 127; *Carr v. Carr*, 52 N. Y. 251; *G. Nat. Bank v. Queen*, 159 App. Div. 236; *Fairbanks v. Sargent*, 117 N. Y. 320; *Wheeler v. Newbould*, 16 N. Y. 392; Jones on Collateral Securities [3d ed.], §§ 664, 680; *Field v. Sibley*, 74 App. Div. 81; 174 N. Y. 514; *Bank of Staten Island v. Silvie*, 89 App. Div. 465.)

Samuel S. Koenig and *Milton M. Sittenfield* for respondents.

CARDOZO, J. In April, 1910, the Nineteenth Ward Bank, the plaintiff's assignor, paid to the defendant, the Carnegie Trust Company, \$140,000. The payment was made by checks drawn by the bank to the defendant's order. In return the bank received a written agreement which, after the correction of some admitted errors, reads as follows:

“ NEW YORK, April 23rd, 1910.

“ Mr. BRADLEY MARTIN, JR., President,

“ Nineteenth Ward Bank,

“ 3d Ave. & 57th St.,

“ New York, N. Y.:

“ DEAR SIR.— We acknowledge receipt hereof from the Nineteenth Ward Bank of \$140,000, the proceeds of the following notes:

Demand note of Charles A. Moore, Jr. \$70,000 00

“ “ “ Merchants & Manufacturers’

Securities Company 70,000 00

“ The above amount to be used by us toward the payment of the Carnegie Trust Company stock at \$1.75; Twelfth Ward Bank stock at \$1.00.

“ We agree to hold in trust for you, or any trustees named by you, the above collaterals as paid for by us at prices mentioned above. Whatever part of the above amount is not employed in the purchase of the above stocks, shall be subject to your order at any time.

“ Yours very truly, R. L. SMITH,

“ Vice-President.”

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Before the delivery of this agreement the bank had undertaken to loan \$70,000 to Charles A. Moore, Jr., and a like sum to the Merchants and Manufacturers' Securities Company, upon their promissory notes. The loan was made on the condition that the proceeds be paid to a trustee and invested in stock, which was to be held as collateral security. In fulfillment of that condition the payment to the trust company was made. The trust company never bought the shares mentioned in its agreement. It closed its doors on January 7, 1911, and is now insolvent and in liquidation. The sum of \$16,000 has been paid to the bank by the makers of the notes. Not a dollar has been paid by the trust company. This action has been brought to determine the indebtedness on which the plaintiff's dividend must be computed in the distribution of the defendant's assets. The courts below have held that the trust company must be credited with \$16,000 paid by the makers of the notes, and that the dividend is, therefore, to be computed on \$124,000, and no more. The plaintiff says that this restriction is erroneous, and that the dividend is to be computed on \$140,000, the amount of the trust deposit. We are to choose between these conflicting claims.

Our judgment is that the plaintiff's claim must be upheld. The defendant made a contract which cannot be misread. The contract was that the money paid to it by the bank should be subject to the bank's order. That contract it has not kept. It has no concern with payments made by strangers. They were not made in its behalf (*Atlantic Dock Co. v. Mayor, etc. of N. Y.*, 53 N. Y. 64, 67; *Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 528, 540). Its duty is to keep its contract. The dividend computed on \$140,000 may not amount to \$124,000. If it amounts to more, the bank will hold the excess in trust for the makers of the notes (*Madison Square Bank v. Pierce*, 137 N. Y. 444; *Hanover Nat. Bank v. Am. Dock & Trust Co.*, 14 App. Div. 255, 259). But those are matters in which the defendant has no interest. A right

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of action became vested in the bank at the moment of the trust deposit. The ownership of that right of action has never changed except as it has passed to the plaintiff by force of the bank's assignment. It is not partly in the plaintiff and partly in the makers of the notes. Their payments on account of the notes did not transform them into equitable assignees of the right of action against the trust company. The defendant's liability is single and entire.

Any other conclusion would be fruitful of unjust results. To split the right of action between the bank and the bank's customers would be to destroy a part of the security. A debt fixed at \$124,000 must yield a dividend of something less, for the debtor, the trust company, is insolvent. The judgment under review leaves the deficiency unsecured. By applying the \$16,000 in reduction of the defendant's debt, the creditor has been made to lose a part of his collateral. The outcome demonstrates the error. A creditor may not be required to surrender any part of his collateral till payment has been made in full (*People v. Remington & Sons*, 121 N. Y. 328, 333; *Evertson v. Booth*, 19 Johns. 486). If the makers had paid in full, a different question would be here. The right of action against the trust company might then pass to them by subrogation as equitable assignees (*Dunlop v. James*, 174 N. Y. 411; *Twombly v. Cassidy*, 82 N. Y. 155). But the equity of subrogation does not arise until the whole debt has been discharged (*Columbia F. & T. Co. v. Kentucky Union Ry. Co.*, 60 Fed. Rep. 794, 796; Sheldon on Subrogation, § 127).

The judgment of the Appellate Division, so far as appealed from, should be reversed, with costs in the Appellate Division and in this court, and the judgment of the Special Term should be modified by adding to the plaintiff's claim the sum of \$16,000, with interest from April 23, 1910, to January 7, 1911.

CHASE, COLLIN, HOGAN and POUND, JJ., concur; CUDDEBACK, J., dissents; HISCOCK, Ch. J., not voting.

Judgment accordingly.

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Statement of case.

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EDWARD M. MORRIS et al., Appellants, v. WILLIAM G. HENRY et al., Respondents.

Judicial sale — cannot be attacked upon the ground of a subsequent change in interpretation of law.

A change in the rule of law cannot impair the obligation of a contract. Where a judicial sale of land was made in accordance with the directions and requirement of an order of the court, the law as then declared entered into the contract of sale and conveyance, and the sale is valid and will not be interfered with.

Morris v. Henry, 166 App. Div. 970, affirmed.

(Argued May 17, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 5, 1915, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Sardius D. Bentley for appellants. This action is not barred by order of the Supreme Court made in the proceeding instituted by the trustee; nor are these appellants estopped to prosecute this action by that order or by the deed made by the trustee; nor are the questions raised in this suit *res adjudicata*. (*Durant v. Abendroth*, 97 N. Y. 132; *Rose v. Henly*, 4 Cranch, 241; *Risley v. Phoenix Bank*, 83 N. Y. 318; *State of Rhode Island v. Comm. of Massachusetts*, 12 Pet. 657; *Wilcox v. Jackson*, 13 Pet. 511; *Thompson v. Whitman*, 18 Wall. 457; *The Confiscation Cases*, 20 Wall. 107; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Dalzell v. O'Dell*, 3 Hill, 215; *Frost v. Saratoga Mut. Ins. Co.*, 5 Den. 154; *Sparrow v. Kingman*, 1 N. Y. 242.)

Clarence W. McKay, Asher P. Whipple, Frederick M. Whitneg, R. C. Westbury, Burlew Hill, Nicholas J.

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Weldgen and *Herbert L. Bentley* for respondents. The issues raised in this action are *res adjudicata*, and to reverse or reopen a final judgment between the same parties and upon the same facts would be detrimental to public interest, and would tend to destroy all respect for the court's solemn decrees. (*People v. Lazansky*, 208 N. Y. 435; *Roberts & Co. v. Buckley*, 145 N. Y. 215; *Straus v. American Publishers' Assn.*, 193 N. Y. 498; *Goebel v. Iffla*, 111 N. Y. 170; *Childs v. Childs*, 150 App. Div. 656.)

COLLIN, J. The plaintiffs seek in this action an adjudication that an order granted by the Supreme Court on November 7, 1891, the sale pursuant to it, and the deed given to effect the sale were and are void as against the plaintiffs. Thus far they have been defeated.

Immediately after the order of November 7, 1891, was entered the plaintiffs by their guardian *ad litem* appealed from it to the General Term of the Supreme Court. Their appeal resulted in an order affirming the order appealed from. (*Matter of Morris*, 63 Hun, 619.) Their appeal to this court was likewise unsuccessful. (*Matter of Morris*, 133 N. Y. 693.) Subsequent to the decision of this court the sale and the deed attacked by them then and in this action were executed.

The exact claims of the plaintiffs asserted in this action were decided adversely to them in the former proceeding by this court. The tract of land involved and the facts and conditions under investigation and adjudication in that proceeding and in this action are identical. The plaintiffs assert, however, that our decision in *Losey v. Stanley* (147 N. Y. 560) is in direct conflict with our prior decision already mentioned, and should constrain us to reverse the present judgment. We do not enter upon the consideration of the assertion. We decided that the order directing the sale of the tract of land was in all respects valid. The sale and deed were made in accordance with

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the directions and requirements of the order. The grantee under the sale and deed acquired a title to the land which the law of the state had declared valid, in so far as the order here attacked was involved. The law, as declared, entered into the contract of sale and conveyance. A change in the rule of law cannot impair the obligations of the contract. (*Muhlker v. N. Y. & Harlem Railroad Co.*, 197 U. S. 544.) This decision does not question the general rule enunciated in the *Losey* case.

The judgment appealed from should be affirmed, with costs.

HISCOCK, Ch. J., CHASE, HOGAN, POUND, CRANE and ANDREWS, JJ., concur.

Judgment affirmed.

McNULTY BROTHERS, Plaintiff, v. CARSTEN H. OFFERMAN et al., Appellants and Respondents, CROSS, AUSTIN & IRELAND LUMBER COMPANY et al., Respondents and Appellants, and GEORGE WEIDERMAN ELECTRIC COMPANY, Respondent.

Mechanics' liens — agreement by landlord to contribute specified sum of cost of improvements being made to leased premises by tenant thereof — failure of tenant to comply with lease and conditions of agreement — extent to which landlord is liable upon mechanics' liens for work done in compliance with agreement.

1. Tenants in common, lessor and lessee, vendor and purchaser, all have interests in the land; but when once they have given their consent to an improvement they cannot by any arrangement among themselves cut off the rights of lienors.

2. The owners of certain real property leased it for a term of years to a tenant who desired improvements made, for which purpose the owners agreed to contribute a sum named conditioned upon payment of the rent and upon certain improvements being made as therein set forth. The tenant did not comply with the terms of this agreement and failing to pay the rent was dispossessed and the owners put to heavy loss in completing the improvements. This litigation involves the adjustment of the claims of lienors who sup-

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plied material to the tenant. *Held, first*, that the tenant in making these improvements was not a contractor within the meaning of the Lien Law (Lieu Law, §§ 2, 3, 4; Consol. Laws, ch. 33). *Second*, so far as the liens are confined to work called for by the lease, they were properly allowed. Within those limits the landlords' estate may be charged to the same extent as if the owners of that estate had ordered the work themselves. In substance, they have made the lessee their agent for that purpose. *Third*, so far as the material was used in alterations not called for by the lease, the liens have been properly rejected.

McNulty Brothers v. Offerman, 164 App. Div. 949, affirmed.

(Argued May 22, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 10, 1914, modifying and affirming as modified a judgment of Special Term in an action to foreclose mechanics' liens.

The facts, so far as material, are stated in the opinion,

William H. Hamilton and Norman C. Conklin for Carsten H. Offerman et al., appellants and respondents. It was error to sustain a lien against the owner when the only alleged consent was the \$15,000 conditional contract in the lease, and no money ever became due to Leininger, the principal contractor. (*Van Clief v. Van Vechten*, 130 N. Y. 577; *Butler v. Aquehonga Land Co.*, 86 App. Div. 439; *Larkin v. McMullin*, 120 N. Y. 206; *Johnson Service Co. v. Hildebrand*, 149 App. Div. 680; *Smith v. Sheltering Arms*, 89 Hun, 70; *Wood Co. v. Clark & Sons Co.*, 31 App. Div. 356; *Wexler v. Rust*, 144 App. Div. 296; *Hollister v. Mott*, 132 N. Y. 18; *Brainard v. County of Kings*, 155 N. Y. 538; *Maneely v. City of New York*, 119 App. Div. 390.) There was no consent under section 3 of the Lien Law, independent of the conditions and limitations imposed by the lease and section 4 of the Lien Law; and the general covenants in the lease are no consent. (*Hankinson v. Valentine*, 152

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N. Y. 20; *Butler v. Aquehonga Land Co.*, 86 App. Div. 439; *La Pasta v. Weil*, 20 Misc. Rep. 555; *Regan v. Borst*, 11 Misc. Rep. 92; *Bertholf v. O'Reilly*, 74 N. Y. 513; *Schummer v. Clark*, 107 App. Div. 209; *De Klyn v. Simpson*, 34 App. Div. 436; 165 N. Y. 282; *McLean v. Sanford*, 26 App. Div. 603; *Marsh v. Thompson Realty Co.*, 174 App. Div. 218; *Sager v. Renwick P. & T. Assn.*, 172 App. Div. 359; *Vosseleer v. Slater*, 25 App. Div. 368.)

Robert H. Wilson for Cross, Austin & Ireland Lumber Company et al., respondents and appellants. The material parts of the lease show the consent of the owners. (*McNulty v. Offerman*, 141 App. Div. 730.) The lease was a consent to the alterations and improvements therein specified. (*Jones v. Menke*, 168 N. Y. 61; *De Klyn v. Gould*, 165 N. Y. 282; *Rice v. Culver*, 172 N. Y. 60; *Nat. W. P. Co. v. Sire*, 163 N. Y. 122; *Barnard v. Adorjan*, 116 App. Div. 535; *Tinsley v. Smith*, 115 App. Div. 708; 194 N. Y. 581; *Steeves v. Sinclair*, 56 App. Div. 448.) The provision of the lease that the owners were to contribute \$15,000 toward these alterations did not limit the amount which the lienors are entitled to recover. (*Steeves v. Sinclair*, 56 App. Div. 448; *Schmalz v. Mead*, 125 N. Y. 188; *Mosher v. Lewis*, 94 App. Div. 565; *National Wall Paper Co. v. Sire*, 163 N. Y. 122; *De Klyn v. Gould*, 165 N. Y. 282; *McNulty v. Offerman*, 141 App. Div. 730.) The covenant in the lease under which these alterations were made was not a separate contract and was never understood or intended so to be. (*McNulty v. Offerman*, 152 App. Div. 181.)

Woolsey A. Shepard for Weiderman Electric Company, respondent. The owners consented to the doing of the work and the furnishing of the materials by this respondent within the meaning of section 3 of the Lien Law (Laws of 1909, ch. 38, § 3; Cons. Laws, ch. 33), and their

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property is, therefore, properly chargeable with the lien. (*Schmalz v. Mead*, 125 N. Y. 188; *Nat. Wall Paper Co. v. Sire*, 163 N. Y. 122; *Jones v. Menke*, 168 N. Y. 61.)

CARDOZO, J. On April 26, 1907, the defendants Offerman and others, who will be described as the owners, leased to one Ralph Leininger real property in Brooklyn for a term of ten years at rentals ranging from \$53,500 to \$74,000 a year. The building had been used for a department store, and that was the use which was to be continued by the tenant. The owners did not desire any alterations. The tenant thought, however, that alterations would be helpful to himself. Various plans were discussed. Some of them involved the payment of \$60,000 or even more. The owners finally agreed to contribute \$15,000. They exacted no specifications; they received no estimates; they did not know or care whether the cost to the tenant would be \$15,000 or \$20,000 or \$100,000; this they expressly admit; all that they undertook to do was to contribute \$15,000 to the cost, whatever it might be. The contribution was burdened, however, with conditions. The covenant and the accompanying conditions are stated in the lease as follows:

"The party of the second part [the tenant] further covenants and agrees that for the sum of Fifteen Thousand Dollars (\$15,000) to be paid to him by the parties of the first part, subject, however, to the conditions as hereinafter provided, he will during the first six months of the term make the following improvements and repairs in and to the building known as Nos. 503 to 513 Fulton Street and Nos. 234 to 248 Duffield Street, same to be done in a good and workmanlike manner in all respects, under the supervision of a competent architect, to be approved by the parties of the first part, viz: new maple wood flooring on the first floor and basement; appropriate balcony, extending around the walls on the first floor, and divided into suitable rooms; a connection with the subway sta-

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tion from the basement, if permit for the same can be obtained; bringing the second and third floors out even with the Fulton Street front of the building; a new cloak and suit room with retiring room for ladies on the second floor; all show windows changed and improved; kalsomining or painting all walls and ceilings; painting all woodwork, inside and outside, including all pillars; cleaning entire fronts of building; repairing roof and placing elevators and all plumbing in good condition throughout; it being understood and agreed that said Fifteen Thousand Dollars (\$15,000) shall be paid as follows, and only upon the following conditions, viz: (1) That the party of the second part has theretofore paid all installments of rents as they became due hereunder, and faithfully kept and performed all the other terms and conditions hereof for the period of at least nine months; and (2) that there be produced to the parties of the first part a certificate of the architect showing that all said improvements and repairs have been done and performed in a good and workmanlike manner and within the period above specified, and that all the cost and expense thereof has been actually paid and satisfied by the party of the second part, together with proof by search and certificate of the Clerk of Kings County, showing that no liens for any work or materials employed in connection with said improvements and repairs have been filed against the premises or any part thereof and remain unsatisfied; it being understood that the parties of the first part may (but only at their election, however) out of said Fifteen Thousand Dollars (\$15,000) or any part thereof, and on account of the same pay off and discharge any lien or alleged lien that may be so filed. All improvements and repairs to the buildings shall belong to the parties of the first part as soon as made."

The tenant did not complete the improvements in the manner called for by the lease. He did not make a connection with the subway; he did not bring out the second

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and third floors even with the Fulton street front; he did not construct a new cloak and suit room; he failed in other ways to live up to his contract, and his omissions were willful and substantial. He also made many alterations which his contract did not mention. Finally, he failed to pay the rent falling due on September 1, 1907. He was dispossessed, and the owners were put to heavy loss in restoring the dismantled building and completing the improvements. All these facts are found.

This litigation involves the adjustment of the claims of lienors who supplied material to the tenant. So far as the material was used in alterations not called for by the lease, the liens have been rejected. So far as it was applied to alterations called for by the lease, the liens have been allowed. The Cross, Austin & Ireland Lumber Company supplied lumber of the value of \$5,871.95. Most of this, \$4,143.41 in value, went into authorized improvements. The lien has been limited accordingly. Robert T. McMurray and Brother supplied steel and iron. The part which went into the authorized improvements was worth \$5,185.27; the indebtedness was reduced by payments to \$2,935.27; and to this the lien has been restricted. The Weiderman Electric Company made changes in the electric wiring under orders of the New York Board of Fire Underwriters. The owners did not object, but encouraged the tenant to proceed. The changes were necessary incidents of the improvements. Their value, \$922.16, has been made the limit of the lien. Every dollar awarded to lienors represents an equivalent contribution to the value of improvements exacted by the lease.

The owners take the position that the tenant was a contractor; that his pay was conditioned upon his completion of the improvements, and upon his fulfillment for nine months of all the covenants of the lease; and that his failure to live up to his contract defeats the liens of materialmen or subcontractors. Section 2 of the Lien

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Law (Consol. Laws, ch. 33) says: "The term 'contractor,' when used in this chapter, means a person who enters into a contract with the owner of real property for the improvement thereof." Section 4 says: "If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon." The lienors take the position that restrictions applicable to those dealing with a contractor do not fit the situation. They say that landlord and tenant are alike owners, though of different estates or interests (Lien Law, § 2), and that when the landlord consents to improvements by the tenant, the relation which arises is that of joint proprietors rather than principal and contractor. They say that a lien is given to one "who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof" (Lien Law, § 3); and they find in the covenants of this lease a consent which charges a lien upon every interest in the land. If the tenant is in the position of a contractor, and materialmen are merely subrogated to his rights, his default destroys the liens (Lien Law, § 4; *Van Clief v. Van Vechten*, 130 N. Y. 571). If the liens depend upon the consent of joint proprietors to the improvement of the joint property, or at least upon some kindred principle, they have been properly established and properly enforced.

We think the tenant in making these improvements was not a contractor within the meaning of the Lien Law (*Dougherty-Moss Lumber Company v. Churchill*, 114 Mo. App. 578, 587). In the widest sense, any one who makes a contract is to that extent a contractor. But the word, as used in this statute, must receive a narrower meaning. A tenant covenants to make improvements, and to make them at his own expense. The landlord does

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not owe him anything. We have held, none the less, that the landlord's estate may be subjected to a lien (*Jones v. Menke*, 168 N. Y. 61, 64). If the tenant were viewed as a contractor, this result would be impossible. The owners are, therefore, driven to the position that a landlord who is not to pay anything is bound, but a landlord who has undertaken to contribute to the cost goes free. That is not a reasonable outcome. The contractor whom the Lien Law has in view is one who would be so characterized in the common speech of men. He is one who, in the usual course of trade, has undertaken to improve the property of another. If he happens to have some interest in the land himself, his interest is an accident, and not the source and origin and occasion of his action. That is not the position of a tenant who as an incident to his tenancy, either at his own expense or with contributions from the landlord, has covenanted for betterments. His position does not differ in essence from that of a tenant in common who has improved the common property upon a promise by his co-tenant of equitable reimbursement. The statute, when it speaks of contractors, intends to reach another class. Joint proprietors, improving their joint estate, may contract between themselves as they please for the division or apportionment of expense, but their relation to materialmen and laborers remains unchanged. In their relation to lienors they remain owners and not contractors. When we speak of joint proprietors, we use the word in the largest sense. Tenants in common, lessor and lessee, vendor and purchaser, all have interests in the land; but when once they have given their consent to an improvement, they cannot by any arrangement among themselves cut off the rights of lienors (*Miller v. Mead*, 127 N. Y. 544, 548; *Wahle, Phillips Co. v. German Theatre, Inc.*, 153 App. Div. 17; 214 N. Y. 684). The consent once given, the lien attaches under the law.

We do not suggest that the landlord who consents to

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one improvement may be charged with a lien when the lessee constructs another (*De Klyn v. Gould*, 165 N. Y. 282). The subject-matter of the work must be kept within the lines of the consent. In the case before us the liens have been confined to work called for by the lease. Within those limits the landlords' estate may be charged to the same extent as if the owners of that estate had ordered the work themselves. In substance, they have made the lessee their agent for that purpose (*Dougherty-Moss Lumber Co. v. Churchill, supra*). If they had given the order themselves, a materialman, who kept his contract, would have a lien though the building as a whole was never finished. His rights are no less where the owners give their orders through the medium of another. *N. Y. El. Supply & R. Co. v. Bremer* (74 App. Div. 400; 175 N. Y. 520) holds nothing to the contrary. There it was the lienor himself who elected to renounce performance. Here the performance by the lienors was substantially, if not in every instance literally, complete. The omissions would doubtless have been supplied if the owners had recognized the validity of the liens.

The question is, therefore, in its essence a question of intention: did the parties intend to assume the relation of owner and contractor as those terms are usually understood, or did they intend to assume the relation of joint proprietors? Their intention is, of course, to be gathered not so much from what they have styled themselves as from the verities of the situation. None of the indicia that mark the usual relation between owner and contractor are here. There was only the most general description of the improvements. There were no specifications controlling the manner of performance. There was neither estimate of the cost, nor inquiry nor concern about it. There was merely a promise to contribute a lump sum to an indefinite and unknown venture. But the conditions which went with the promise emphasize its purpose. The tenant was not only to complete the

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work to the satisfaction of the landlords' architect; he was also to pay the rent and fulfill the other covenants of his lease for not less than nine months. In point of fact, he did not pay the rent. Even if he had completed the improvements, he would not have earned his compensation. That in itself is strong evidence that we are not to rank him as a contractor. It was not the performance of a building contract, but the performance of the covenants of a lease which conditioned his right. The term of performance was fixed at nine months. If the owners' position is right, it might as well have been ten years. The landlords in that view could have taken the benefit of the improvements and cut off the rights of lienors if at the end of the entire term a single covenant had been broken. The spirit and purpose of the Lien Law are at war with that conclusion (*Schmalz v. Mead*, 125 N. Y. 188, 193).

Other objections to the liens have been urged by counsel for the owners. They have not been overlooked, but have been found to be untenable.

There is also an appeal by the Cross, Austin & Ireland Lumber Company and Robert T. McMurray and Brother. Complaint is made by them that the amount of their liens has been unduly restricted. Their objections have been considered, but cannot be sustained.

The judgment should be affirmed, without costs, except to the defendant George Weiderman Electric Company, and to that defendant costs are awarded against the owners.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN,
MC LAUGHLIN and ANDREWS, JJ., concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.*
LOUIS P. CLAIR, Deceased, Respondent.

Conservation Law — violation of provisions thereof forbidding the selling of game out of season — when serving of partridges as part of meal furnished by a hotelkeeper constituted violation of such provisions.

1. A construction of the Conservation Law should be adopted as appears most reasonable and best suited to accomplish its purpose.

2. Defendant, a hotelkeeper, served with partridges two guests who were stopping with him for several days and who paid for their entertainment, stating that the partridges had been given him. The meal was served in the dining room at a table occupied by the guests, separate from the table occupied by the defendant and his wife and one of his employees, the partridges being the only meat course served. *Held*, that on the facts appearing by the record the partridges were sold, as matter of law and within the prohibition of the statute.

People v. Clair, 175 App. Div. 912, reversed.

(Argued May 24, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 23, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover penalties for the sale of game in violation of sections 176 and 180 of the Conservation Law.

The facts, so far as material, are stated in the opinion.

Egburt E. Woodbury, Attorney-General (*William T. Moore* of counsel), for appellant. The service of partridges with a meal paid for in weekly board bill is a sale of the partridges within the prohibition of sections 176 and 180 of the Conservation Law. (*Fleming v. People*, 27 N. Y. 327; *People v. Kebler*, 106 N. Y. 321; *People v. Briggs*, 114 N. Y. 56; *Rowell v. Janvrin*, 151 N. Y. 60; *Hart v. Clies*, 8 Johns. 40; *Hudson Iron Co. v. Alger*,

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54 N. Y. 173; *Comm. v. Phoenix Hotel Co.*, 157 Ky. 180; *People v. Fox*, 4 App. Div. 38; *People v. Laning*, 40 App. Div. 227; *People v. Russell*, 134 N. Y. Supp. 1068; *Comm. v. Warren*, 160 Mass. 533; *Comm. v. Vieth*, 155 Mass. 442; *Comm. v. Miller*, 131 Penn. St. 118.)

James P. O'Donnell for respondent. The service of the partridges in question was merely a gift and not a sale as contemplated by the statute. (*Gray v. Barton*, 55 N. Y. 68.)

CHASE, J. On October 30, 1915, two men, one a confidential agent of the conservation commission of the state of New York, and the other a game protector employed by said commission, but unknown to the defendant, went to a small hotel in the town of Wilmurt, in the county of Herkimer, of which the defendant was the proprietor, and remained there until the morning of November 7. They departed that morning, paying \$15.50 each for their board and room, being at the rate of two dollars per day for the time that they had been guests for pay of the defendant.

At the close of the noon meal on November 6 the defendant brought from the kitchen into the dining room two dead partridges, and said to one of his said guests that the partridges had been given to him and that he was going to serve them at the evening meal that night. The meal was served in the dining room that evening at a table occupied by the commission employees, the defendant's said guests, separate from the table occupied by the defendant and his wife and one of his employees. The only meat course served to the defendant's said guests were the two partridges which they ate.

Section 180 of the Conservation Law (Cons. Laws, chap. 65), provides: "The dead bodies of birds belonging to all species or sub-species, native to this state, protected by law or belonging to any family, any species or sub-species

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of which is native to this state and protected by law shall not be sold, offered for sale, or possessed for sale for food purposes within this state whether taken within or without this state, except as provided by sections three hundred and seventy-two and three hundred and seventy-three."

Partridges are native to this state. They are game birds and were at the time mentioned protected by law. (Conservation Law, sections 210 and 214.) Sections 372 and 373 of the Conservation Law are not material in the consideration of the question now before us. The question is a simple one and it is whether serving the partridges by the defendant as a part of the meal furnished by him and paid for by his guests as stated constitute a sale of said partridges for food purposes.

It is not claimed that there was any illegality in the possession of the birds nor that it would be illegal if in good faith they were given away. The Conservation Law is intended to preserve the natural resources of the state including game birds enumerated therein and to prevent what is commonly known as "pot hunting," or the killing of birds for profit to the hunter, and in generally dealing therein commercially. For that purpose, among other things, it prohibits the *sale* of the dead bodies of birds that are protected by law.

The preservation of such animals, birds and fish as are adapted to consumption as food, or to any other similar useful purpose, is a matter of public interest, and it is within the police power of the state as the representative of the people to make such laws as will best preserve such game and secure its beneficial use in the future to the citizens of the state, and to that end it may adopt any reasonable regulations not only as to time and manner in which such game may be taken and killed, but also may impose limitations upon the right of property in such game after it has been reduced to possession. Such limitations deprive no person of his property, because he who takes or kills game had no previous right to property

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in it, and when he acquires such right by reducing it to possession he does so subject to such conditions and limitations as the legislature has seen fit to impose. (*State v. Rodman*, 58 Minn. 393; *Geer v. Connecticut*, 161 U. S. 519; *American Express Co. v. People*, 133 Ill. 649; *State v. Dow*, 53 L. R. A. 314; *People v. Bootman*, 180 N. Y. 1.)

A construction of the Conservation Law should be adopted as appears most reasonable and best suited to accomplish its purpose. (*Pierson v. People*, 79 N. Y. 424; *People v. Fox*, 4 App. Div. 38; *People v. Laning*, 40 App. Div. 227.)

Clearly, if in a hotel where meals are served *a la carte* a partridge is ordered prepared and served as food and paid for as such it would constitute a sale within the meaning of the statute. (*Commonwealth v. Phoenix Hotel Co.*, 157 Ky. 180.)

The service of the partridges by the defendant enabled him to omit the service to his guests of other meat or food in their place and stead and saved him the expense of purchasing and paying for such other meat or food. The service of prohibited game as a part of a *table d'hote* meal is necessarily a sale of such game, and it is paid for by the payment for the meal, at least to the extent of a part of the agreed price for such meal.

Any other construction of the statute would enable hotel and boarding house keepers with the aid of associates and assistants to serve game during the open season at regular *table d'hote* meals with little, if any, limitation or restriction. An incentive for an unwise and unreasonable destruction of game would thus remain notwithstanding the statute. It was, among other things, to take away such incentive that the statute was passed. (See *People v. Bootman*, *supra*.) There are many reported decisions by the courts which, while not involving the precise question now before us, are analogous in principle.

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It was held in Vermont that the furnishing of intoxicating liquors by a boarding house keeper to his boarders as a part of a meal for which they paid is in effect a sale to them. (*State v. Lotti*, 72 Vt. 115.)

It was held in Massachusetts that the delivery of milk to the purchaser of a *table d'hote* breakfast as a part of such breakfast is as much a sale of the milk within the statute regulating the quality of milk as if a special price had been put on it or if it had been bought and paid for by itself. (*Commonwealth v. Warren*, 160 Mass. 533. See *Commonwealth v. Worcester*, 126 Mass. 256.)

It has been held in Pennsylvania that serving oleomargarine at a public restaurant as a substitute for butter and as a part of a meal for pay constitutes a sale thereof within the prohibition of the statute for the prosecution of the adulteration of dairy products and fraud in the sale thereof. (*Commonwealth v. Miller*, 131 Penn. St. 118.)

It has recently been held by the United States Supreme Court that the performance in a restaurant or hotel dining room by persons employed by the proprietor of copyrighted musical compositions for the entertainment of patrons without charge for admission to hear it infringes the exclusive right of the owner of the copyright under the Federal statutes. Justice HOLMES, writing for the court, said: "If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected * * *. It is enough to say that there is no need to construe the statutely so narrowly. The defendant's performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere." (*Herbert v. Shanley Company*, 242 U. S. 591, 594.)

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within the terms of the statute may in good faith give the same away or serve the same to an invited guest. It is possible that if the game is served independently of the regular meal by a hotel or boarding house keeper, that the question whether the same as so served, is a gift or a sale, may be one of fact. The facts appearing by the record in this case, however, show that the partridges were sold as matter of law and within the prohibition of the statute.

The judgment should be reversed, with costs in this court and in the Appellate Division.

COLLIN, CUDDEBACK, CARDOZO, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgment reversed.

**AGNES GAFFEY et al., Respondents, v. ST. PAUL FIRE
AND MARINE INSURANCE COMPANY, Appellant.**

Insurance — motor vehicles — when agreement by owners to accept repairs to automobile injured by fire a bar to an action on insurance policy for total loss of car.

Defendant insured plaintiff's automobile truck for \$2,500. It having been badly damaged by fire defendant offered to settle the claim for \$2,000 or repair the car, which latter offer was accepted by plaintiffs provided they were not delayed too long, whereupon the car was taken by defendant for the purpose of making repairs thereon. Plaintiffs remained silent and permitted defendant to complete the repairs. They made no complaint that the work was unreasonably delayed or that the car when repaired was not as good as it was before the fire. When defendant tendered the truck to them and offered to deliver it free of expense they remained silent for upwards of five months, when they commenced this action to recover \$2,500 under the policy for a total loss of the car. Held, that the election of plaintiffs to have the car repaired, and the undertaking of defendant to make the repairs within a reasonable time, created a contractual relation between the parties which terminated all rights of both parties under the policy contract. Such substituted contract deprived defendant of asserting any rights or option

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it had under the policy and deprived plaintiffs under the circumstances of any right to assert a claim under the policy. The only remedy, if any, either party thereafter had was for breach of the new or substituted contract.

Gaffey v. St. Paul F. & M. Ins. Co., 164 App. Div. 381, reversed.

(Argued May 14, 1917; decided June 5, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 16, 1914, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William J. Roche and *William H. Hollister, Jr.*, for appellant. The agreement effected by these letters constituted a novation between the parties and displaced the policy, so far as it related to the matter in question, to wit, the adjustment and payment of the loss. There was a valid compromise of a dispute and difference between the parties. (21 Am. & Eng. Ency. of Law [2d ed.], 660; *Bandman v. Finn*, 185 N. Y. 508; *Morehouse v. S. Nat. Bank*, 98 N. Y. 503; *Kromer v. Heim*, 75 N. Y. 574; *Wahl v. Barnum*, 116 N. Y. 87; *Feefer v. Webber*, 78 N. Y. 334; *Wehrum v. Kuhn*, 61 N. Y. 623; *Chemical National Bank v. Kohner*, 85 N. Y. 189; 4 Cooley on Ins. 3585; *Farmers & Merchants' Ins. Co. v. Chestnut*, 50 Ill. 111; *Millers' Nat. Ins. Co. v. Kinneard*, 136 Ill. 199; *Belt v. Am. Central Ins. Co.*, 74 Hun, 448; *Crimmins v. Carlyle Realty Co.*, 132 App. Div. 664; *McIntosh v. Miner*, 37 App. Div. 483; *Beals v. Home Insurance Co.*, 36 Barb. 614.)

H. D. Bailey and *Thomas F. Powers* for respondents. The dismissal of the complaint was error, properly reversed by the Appellate Division. (*Brown v. N. Y. C. R. R.*

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Co., 44 N. Y. 79; *McCotter v. Mayor, etc.*, 37 N. Y. 325; *Baigas v. Sizer*, 30 N. Y. 647; *Eaton v. Aspinwall*, 19 N. Y. 111; *Myers v. Smith*, 48 Barb. 614.) Plaintiffs had not offered to do anything and the plaintiffs were not, either then or thereafter, bound to do anything, save, possibly, to receive the completely repaired and restored car at its place of business, Troy, N. Y., within the proper time. (*Treat v. Ullman*, 34 Misc. Rep. 553.) Under the law, if defendant was to restore the property, it must be done in thirty days. (*Clover v. Greenwich Ins. Co.*, 101 N. Y. 277; *McAllaster v. Niagara Fire Ins. Co.*, 84 Hun, 322; *Beals v. Home Ins. Co.*, 36 Barb. 354, 614; *Quick v. Wheeler*, 78 N. Y. 300; *White v. Corlis & Tift*, 46 N. Y. 467; *Frith v. Lawrence*, 1 Paige, 434.) The plaintiffs owed no duty of correspondence to the defendant. Once for all plaintiffs had made their conditional suggestion to the defendant and it was for the defendant to comply therewith, or to pay the moneys that it owed under the policy when due. (*McAllaster v. Niagara Fire Ins. Co.*, 156 N. Y. 80; *Drake v. N. Y. Iron Mine*, 156 N. Y. 90.) There was no performance of the conditional restoration contract, nor was any tender of performance. (*McMichael v. Kilmer*, 76 N. Y. 36; *Harris v. Mulock*, 9 How. Pr. 402; *Eddy v. Davis*, 116 N. Y. 251; *Strong v. Blake*, 46 Barb. 227; *Bakeman v. Pollar*, 15 Wend. 687; *Cashman v. Martin*, 50 How. Pr. 337.)

HOGAN, J. May 1st, 1911, defendant issued to plaintiffs a policy of insurance upon an automobile delivery truck, wherein it insured plaintiffs to an amount not exceeding two thousand five hundred dollars, against loss or damage by fire. By the terms of the policy, the automobile insured (body, machinery and equipment) was by agreement of the parties valued at the sum for which the same was insured, namely, \$2,500.

The policy provided:

"25. This Company shall be liable to pay hereunder such proportion of any ascertained loss or damage as the sum insured bears to the said valuation."

"12. In ascertaining the amount of any partial loss or damage, only the cost of repairing or, if necessary, replacing the parts damaged or destroyed, including the charges incidental thereto, shall be considered."

October 11th, 1911, the automobile became disabled on the highway between the city of Troy, the residence of plaintiffs, and Ballston Spa, Saratoga county. The truck was left on the roadway and on October 12th the fire occurred. This action was brought on the policy to recover for the loss resulting therefrom.

Upon a trial of the action the complaint was dismissed at the close of the case. Upon appeal from the judgment entered thereon the Appellate Division by a divided court reversed the judgment and granted a new trial. From such order and judgment the defendant appeals to this court.

The plaintiffs on October 23d filed a proof of loss, claiming the loss sustained by them at \$2,500. Under date of October 25th, 1911, defendant's general agents addressed a letter to the plaintiffs, which reads:

"SAINT PAUL FIRE AND MARINE INSURANCE COMPANY.
"NEW YORK, *October 25, 1911.*
"Messrs. SAGE & GAFFEY,

"800 River Street,

"Troy, N. Y.:

"GENTLEMEN.—We have before us our inspector's report in reference to the damage to your automobile truck insured under policy No. 56492 and have to advise that as the car was damaged and taken apart to a considerable extent prior to the fire and the extensive damage done by the fire was in consequence of this, there are a number of items, therefore, that we are not responsible for; such as the damaged gears, crank case, chains, etc., and in view of these circumstances, we will settle this

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claim on the basis of paying you \$2,000, or we will have the car shipped to New York for repairs.

"Please let us hear from you at once as to which of these propositions you desire to accept.

"Yours very truly,

"WHITON & MERGES,

"A. W. S.

General Agents,

"By A. WHELPLEY."

On October 26th, 1911, plaintiffs replied to the letter as follows:

"TROY, N. Y., Oct. 26th, 1911.

"Messrs. WHITON & MERGES:

"GENTS.—In reply to yours of the 25th will say that if you make the car as good as before the fire and not delay us too long that will be all right. As far as the missing parts are concerned, the only part taken after we discovered the fire were the chains. We have located them. The rest of the stuff we look to you for.

"Yours truly,

"SAGE & GAFFEY,

"800-802 River St.,

"Troy, N. Y."

November 2d, 1911, defendant's agents wrote the plaintiffs, stating in effect that they had made arrangements to have the truck shipped to New York and would at once proceed with the repairs. The letter further stated: "We estimate that it will take about four (4) weeks to repair it in" and requested the plaintiffs to forward by express at once any parts they might have which were not with the truck. The plaintiffs had knowledge of the whereabouts of the chains belonging to the truck, as stated by them in their letter of October 26th. Upon the trial one of the plaintiffs testified that the chains were not sent as requested and gave as a reason therefor "that they were up there on the ground, I didn't send them down, I thought if they wanted them they could come after them."

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No further action was taken by plaintiffs after the letter of November 2d. The defendant wrote plaintiffs on November 10th, 1911, advising them that the repairs had been started, that they had not heard from them in reference to shipping the chains and asked them to ship them as defendant did not wish to delay the work.

Plaintiffs did not reply to any letters addressed to them by defendant after the 2d of November. They did not complain of the action of the defendant in moving the truck from Saratoga county to the city of New York for the purpose of making repairs thereon.

January 8th, 1912, defendant addressed a letter to the plaintiffs informing them that the truck which had been damaged by fire, giving the number of the same, had been fully repaired and made as good as before the fire according to correspondence and agreement in the letter of plaintiffs of October 26th, 1911; that upon receipt of advices from plaintiffs the defendant would, as agreed, attach to the car, free of expense, any model of body which plaintiffs would suggest, not to exceed the cost of the body upon the car originally, concerning which they asked to be advised. The letter also tendered to plaintiffs the machine so repaired and offered to deliver the same to them at Troy or any other place they might name, free of expense, upon receipt of such information as to place of delivery. The plaintiffs made no reply to this letter, and subsequently commenced this action.

It is important to consider the relations existing between the parties prior to the commencement of this action. The plaintiffs on October 23d, 1911, filed proof of loss claiming to be entitled to the sum of \$2,500 for a total loss. They received from the defendant the letter of October 25th, referring to the inspector's report as to the damage, and were informed in substance that the defendant denied liability for at least a portion of the damage done, by reason of the fact that the car had been taken apart prior to the fire, and in view of the circum-

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stances the defendant offered to pay to the plaintiffs two thousand dollars or have the car shipped to New York for repairs, and asked plaintiffs which of the propositions they desired to accept. Upon receipt of that proposition the plaintiffs had the right: (1) To reject both propositions and seek a recovery as for a total loss for which they had filed proof of loss; had they done so, the defendant under the fourteenth clause of the policy would be entitled if so advised to have the amount of loss ascertained by appraisers; (2) accept the sum of \$2,000 in cash; (3) allow defendant to have the car shipped to New York for repairs. Plaintiffs did not insist upon their rights under the policy. They did not agree to accept two thousand dollars in cash, but did elect to accept the proposition to have the car repaired. Their letter of October 26th to defendant was tantamount to saying: We accept your proposition to have the car shipped to New York for repairs, but you must make it as good as new and not delay us too long.

On November 2d plaintiffs had knowledge that defendant had arranged to ship the truck to New York, and on November 10th that the truck was there, and work thereon had been commenced. From that fact but one conclusion is deducible, namely, that defendant assumed the obligation "to make the car as good as it was before the fire, and not delay too long," and thus comply with the conditional acceptance by plaintiffs of the proposition in their letter of October 26th. The defendant did not give to plaintiffs any assurance as to the length of time necessary to make the repairs. It merely made an estimate of the time at about four weeks. Defendant was entitled to a reasonable time within which to make the repairs. Plaintiffs never made complaint that the work was unreasonably delayed or that the car was not as good as it was before the fire. They remained silent and permitted defendant to complete the repairs, and when defendant tendered the truck to them and offered to

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deliver it to them free of expense they did not acknowledge the letter, but remained silent until upwards of five months, when they commenced this action to recover \$2,500 under the policy for a total loss of the car.

The election of plaintiffs to have the car repaired, and the undertaking of defendant to make the repairs within a reasonable time, created a contractual relation between the parties which terminated all rights of both parties under the policy contract. Such substituted contract deprived defendant of asserting any rights or option it had under the policy and deprived plaintiffs under the circumstances of any right to assert a claim under the policy. The only remedy, if any, either party thereafter had was for breach of the new or substituted contract. (*Morrell v. Irving Fire Insurance Company*, 33 N. Y. 429; *Wynkoop v. Niagara Fire Insurance Company*, 91 N. Y. 478; *Heilmann v. Westchester Fire Insurance Company*, 75 N. Y. 7.)

The order of the Appellate Division should be reversed, with costs to appellant in the Appellate Division and this court, and the judgment entered at Trial Term affirmed.

CHASE, COLLIN, POUND and CRANE, JJ., concur; ANDREWS, J., concurs in result; HISCOCK, Ch. J., absent.

Order reversed, etc.

RUBBER TRADING COMPANY, Respondent, v. MANHATTAN
RUBBER MANUFACTURING COMPANY, Appellant.

Sale—delivery of goods—refusal of purchaser to accept goods until delivered at factory of purchaser and inspection thereat—vendor cannot maintain action for purchaser's breach of contract of sale when tender is accompanied by a condition.

Defendant having agreed to buy from plaintiff, an importer, a quantity of rubber, was notified of the arrival of shipments and asked to inspect the rubber at the warehouse or on the dock, which defendant refused to do and stated that there would be no accept-

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ance until the rubber reached its factory. Plaintiff insisted on its inspection at the storehouse and that the rubber leaving the storehouse would be an acknowledgment of its acceptance. Defendant insisted that withdrawal of the goods from the warehouse must be without prejudice to their rejection afterwards. Neither side would yield. The plaintiff sold part of the rubber at a reduced price; the rest it retained and brought this action to recover the profit which was lost. Plaintiff's complaint, as amended on the trial, alleges that the defendant "wrongfully repudiated the said contract, and definitely notified the plaintiff that it would not thereafter perform the same." Held, that a tender, burdened with the condition, as this tender was, that inspection must first be made, and satisfaction stated, was not a tender which answered the requirements of the contract; that the plaintiff failed to establish that it rescinded the contract on the ground of defendant's anticipatory breach; that plaintiff having failed to give notice of an election to treat it as abandoned, the contract survived (Personal Property Law, § 146: L. 1911, ch. 571; Cons. Laws, ch. 41), and the award of damages in its favor cannot be sustained.

Rubber Trading Co. v. Manhattan Rubber Mfg. Co., 164 App. Div. 477, reversed.

(Argued May 25, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 8, 1914, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Louis W. Stotesbury and *Justin L. Miner* for appellant. There was no repudiation of the contract by the defendant. (*Nat. Cont. Co. v. H. R. W. P. Co.*, 192 N. Y. 209; *Graves v. White*, 87 N. Y. 463; *Dingley v. Oler*, 170 U. S. 490.) The alleged repudiation was never adopted by the plaintiff, was never acted upon, and affords no excuse for plaintiff's failure of performance. In order to recover in an action plaintiff was bound to establish its readiness to perform and a valid tender of performance on its part. (*Ga Nun v. Palmer*, 202 N. Y. 483; *Hochster v. De La Tour*, 2 El. & Bl. 678; *Frost v.*

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Knight, [L. R.] 7 Exch. 111; *Foss-Schneider Brewing Co. v. Bullock*, 59 Fed. Rep. 83; *Bernstein v. Meech*, 130 N. Y. 354; *Becker v. Seggie*, 139 App. Div. 463; *Marks v. Van Eeghen*, 85 Fed. Rep. 853; *Dingley v. Oler*, 117 U. S. 490; *Roehn v. Horst*, 178 U. S. 1.)

Harry D. Nims and *Clinton De R. Combes* for respondent. A change in terms is equivalent to a refusal to perform. (*Ackerman v. A. V. Mills*, 11 N. Y. Supp. 528; *N. Y. & P. Co. v. Busch*, 148 Fed. Rep. 929.) An offer by a vendor, after an anticipatory breach by the vendee, to perform under the original terms or under new terms, does not, unless accepted by the vendee, constitute a waiver of the breach. (*Canda v. Wick*, 100 N. Y. 127; *Poel v. B. B. C. Co.*, 159 App. Div. 365; *Nichols v. S. S. Co.*, 137 N. Y. 471; *Reindeau v. Bullock*, 147 N. Y. 269; *Alpena Co. v. Backus*, 156 Fed. Rep. 944; *United Press Assn. v. National Assn.*, 237 Fed. Rep. 547.)

CARDOZO, J. The defendant, a manufacturer of rubber, agreed to buy from the plaintiff, an importer, fifteen tons of prime thin disc Manicoba rubber at \$1 per pound; delivery was to be made at the rate of about five tons a month in September, October and November, 1912, and delivery orders were to be sent to the buyer when the rubber was ready. Goods were to be billed on a credit of ten days. The first delivery under this contract was made in August, and was paid for in September. At the time of payment inspection had not yet been made. Defects were later discovered, and 7,900 pounds were returned with the plaintiff's consent. The incident seems to have warned the defendant of the need of caution. A second shipment arrived from abroad in October. The defendant's president was notified of the arrival of the vessel, and was asked to inspect the rubber while it lay in the warehouse or on the dock. He refused to do so. There would be no acceptance, he said, till the rubber reached the

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defendant's factory, where it could be carefully examined, and subjected to laboratory tests. "We won't accept any more rubber at the storehouse. You have got to ship it to our factory, and we will put it through a chemical test and won't pay you unless it is satisfactory." He also told the broker who signed the contract for the buyer that he would accept only round discs, but a few days later he said that the shape did not matter if the rubber in other respects was right. The plaintiff was not satisfied that acceptance should be postponed until delivery had been made. It wrote the defendant on October 16, 1912: "Referring to our contract with you of July 19, 1912, for fifteen tons of Prime Thin Disc Manicoba Rubber; you have stated to us that you intend to make a very careful inspection of the rubber delivered under this contract, in addition to the usual inspection. We have placed with the West Side Warehouse, No. 79 to No. 101 Laight Street, about 11,200 pounds of rubber, which we hereby tender you as the October delivery under this contract. Please make such further inspection of this rubber as you wish as soon as possible, notifying us when it will be convenient for you to make such inspection, in order that we may place enough of our men at your disposal to enable you to make the examination quickly and easily." The letter closes with the statement: "Delivery orders are ready to be handed to you as soon as you notify us that this rubber is satisfactory." The defendant sent back word to forward the delivery orders, and that the rubber would then be taken, but that its quality must be right or payment would not be made. The plaintiff retorted "that the rubber must be approved in New York, and its leaving the storehouse would be an acknowledgment of its acceptance." Other shipments arrived from abroad in November. Again the plaintiff gave warning that delivery orders would not be furnished till notice was received that the rubber was satisfactory. Its president admits that it never receded

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from that position. Neither side would yield. Each notified the other that the contract had been broken. The plaintiff sold part of the rubber at a reduced price; the rest it retained. The action is brought to recover the profit which has been lost.

The complaint, as it first stood, alleged a tender of the October and November shipments, and the defendant's refusal to receive them. Shortly before the trial, it became manifest that this theory would not hold. The tender had been coupled with a condition that approval must precede delivery. This condition was a departure from the contract. The plaintiff makes no claim to the contrary. The trial judge charged without objection: "The plaintiff had no right to demand a stipulation that the goods were satisfactory before making delivery. The insistence upon such demand invalidated the tender. There has been no tender of performance by the plaintiff in this case, nor is there one claimed." To escape this difficulty, the plaintiff amended its complaint, and changed the theory of its action. It alleged that on October 9, 1912, "the defendant wrongfully repudiated the said contract, and definitely notified the plaintiff that it would not thereafter perform the same." This anticipatory breach, it is said, made tender of the rubber needless. Two acts are relied upon as evidence of repudiation. One is the defendant's announcement that withdrawal of the goods from the warehouse must be without prejudice to their rejection afterwards. The other is the notice that the discs delivered must be round. The demand for round discs was withdrawn a few days later. It was not referred to again by either of the parties. Of the two acts assigned as evidence of repudiation, the first only deserves discussion.

We may assume without deciding that the warehouse, which was the place of delivery, was also the place where inspection should have been made (*Bliss Co. v. U. S. Incandescent Gas Light Co.*, 149 N. Y. 300, 306;

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Williston on Sales, § 480). We may also assume, again without deciding, that the defendant was at fault and in effect renounced performance when it insisted upon the right to withhold payment if defects which could have been discovered at the warehouse, were discovered later at the factory. Whether adequate and customary inspection was possible at the warehouse, was a question for the jury. But even though the defendant was at fault, the contract, none the less, survived unless the plaintiff gave notice of an election to treat it as abandoned (Sales of Goods Act, § 146, L. 1911, ch. 571; Consol. Laws, ch. 41). The plaintiff learned on October 9 that the defendant insisted upon the right of inspection at the factory. With that knowledge, it asserted the continued existence of the contract, made tender of performance, coupled its tender with an untenable condition, and counted on the rejection of that tender as the sole evidence of the breach. The right to delivery was not dependent upon previous inspection. The buyer was free to omit inspection altogether. It may thereby have taken the risk of defects which inspection would have revealed, but that is another question. It certainly did not take the risk of latent defects. A tender, burdened with the condition that inspection must first be made, and satisfaction stated, was not a tender which answered the requirements of the contract. The point is made that this was not its purpose. The contract, we are told, had been already broken by the buyer; and the seller, treating it as abandoned, proposed a new contract, subject to a new condition. But that is not what happened. The seller did not profess to be submitting an offer for a new contract. It professed to be asserting its rights under the old one. From the beginning to the end of its letter of October 16, there is no hint that the buyer has done anything wrong. Still less is there any hint that because of the buyer's wrong, the seller has chosen to treat the contract as abandoned. The statute says that the seller

must give notice of his election (Sales of Goods Act, § 146). One cannot read that notice in the terms of the plaintiff's tender.

In this situation, the rights of the parties are not doubtful. The plaintiff did not rescind for the defendant's anticipatory breach. It rescinded for the defendant's rejection of a tender which imposed an unauthorized condition. It attempted at the trial to revert to the earlier breach, which antedated its own misconduct. It could not purge itself of wrong so easily. On October 16, 1912, and again on November 4 and 15, the dates of the successive tenders, it made its choice. It chose to keep the contract alive in spite of anything that had gone before. But a contract, thus preserved, remains alive as much for the benefit of the buyer as for the benefit of the seller (*Ga Nun v. Palmer*, 202 N. Y. 483, 490; *Becker v. Seggie*, 139 App. Div. 463; *Frost v. Knight*, [L. R.] 7 Ex. 111; *Dingley v. Oler*, 117 U. S. 490, 503; *Lehmaier v. Standard S. & T. Co.*, 123 App. Div. 431, 436; *Avery v. Bowden*, 5 E. & B. 714.) Each may take advantage of events which supervene. The buyer may now insist that the seller's misconduct shall be cast in the balance with its own. It may say that at the moment of the tender, while the contract was still alive, seller and buyer were at least equally at fault (*Avery v. Bowden*, *supra*). If the defendant never retracted its unlawful claim of right, the like is true of the plaintiff. The one as much as the other is chargeable with wrong. In saying this, we assume that at the outset the wrong was chargeable to the defendant. The plaintiff should have kept its own conduct free from blame. The award of damages in its favor is not to be sustained.

The judgment should be reversed and a new trial granted with costs to abide the event.

CHASE, COLLIN, CUDDEBACK, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

In the Matter of the Application of the CITY OF NEW YORK, Appellant, Relative to Acquiring Land Required for Opening and Extending Tibbett Avenue in the Borough of The Bronx.

M. A. DEAN, Appellant; MARGARET E. PUTNAM et al., as Executors of and Trustees under the Will of ALBERT E. PUTNAM, Deceased, Respondents.

New York (city of)—street opening proceedings—provisions of charter (L. 1901, ch. 466, § 992, amd. by L. 1910, ch. 548) that abutting owners who cede lands from front of lot to center of street without compensation shall not be chargeable with any expense of opening the street except their proportion of damages for buildings taken or injured by the changes made in opening the street.

1. The validity of the sections of the charter of the city of New York allowing assessments for damages awarded by reason of a future contemplated change of grade cannot be questioned on constitutional grounds.

2. As to the persons affected by a street opening proceeding in that city who have not appealed, the report of the commissioners of assessment is final and conclusive. (Charter, § 998.)

3. Section 992 of the Greater New York charter, as amended by chapter 548 of the Laws of 1910, provides that the owners of land improved within the proposed street and extending to the center line thereof may without compensation and before the appointment of commissioners convey their right, title and interest therein to the city of New York, and that after such cession "the lands fronting on that portion of the streets so conveyed, and extending to the center of the block on either side of such portion of said street so conveyed, shall not be chargeable with any portion of the expense of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid." Under this provision as construed in connection with section 980 of the charter, an assessment can be made against a person ceding land for a proposed street with respect to buildings injured by the opening or regulation of the street although not actually taken.

Matter of City of New York (Tibbett Ave.). 175 App. Div. 975, reversed.

(Argued April 24, 1917; decided June 5, 1917.)

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Points of counsel.

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APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 1, 1916, which affirmed an order of Special Term confirming a supplemental report of the commissioner of assessment in street opening proceedings.

The facts, so far as material, are stated in the opinion.

Benjamin Trapnell for Mary A. Dean, appellant. By the plain language of section 992 of the charter, notwithstanding a landowner has ceded land required for a street, his remaining lands within the area of benefit are chargeable with their proportion of awards made for intended regulation no less than awards made for buildings taken. The phrase "awards for buildings," as used in section 992, includes damages awarded for injuries to buildings not taken by reason of intended regulation. (L. 1901, ch. 466, § 992, amd. L. 1910, ch. 548.)

Lamar Hardy, Corporation Counsel (Joel J. Squier and John J. Kearney of counsel), for City of New York, appellant. Section 992 of the charter as existing prior to the enactment of chapter 606 of the Laws of 1915 provided and intended that the land abutting upon the ceded portion of a street should be assessed its proportionate share of the awards for buildings damaged by reason of the intended regulation of the street. (L. 1901, ch. 466, § 992; amd. L. 1910, ch. 548.)

Albert W. Putnam for respondents. Section 992 of the charter of the city of New York exempts the lots of the respondents, by reason of the cessions made, from all assessments in this proceeding. (L. 1901, ch. 466, § 992; amd. L. 1910, ch. 548.) Respondents' lots cannot be assessed in this proceeding for any alleged damages awarded by reason of a future contemplated change of grade, because section 980 of the Greater New York charter purporting to give such power is unconstitutional in that respect. (*People ex rel. N. Y. C. Church*

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v. *Coler*, 60 App. Div. 77; 168 N. Y. 644; *People ex rel. City of New York v. Stilling*, 134 App. Div. 480; *People ex rel. Stevens v. Philip*, 88 App. Div. 560; *People ex rel. Janes v. Dickey*, 206 N. Y. 581; *Stuart v. Palmer*, 74 N. Y. 183.)

ANDREWS, J. The theory of local assessments is that those whose property is peculiarly benefited by an improvement—who receive advantages other and greater than does the general public—may fairly be charged with the cost; and among those so assessed the amount to be paid by each should be in proportion, as near as may be, to the benefits received. An exact distribution cannot always be made. Rough justice is practically all that can be attained. But there should be some attempt at approximation to the ideal.

When we construe statutes imposing local assessments this theory should be kept in mind.

In proceedings for the opening of streets in the city of New York there are four classes of expenses involved:

1. There are the costs of the proceeding.
2. There are damages for the land actually taken for the proposed street.
3. There are damages for the buildings actually taken.
4. There are damages to the buildings not taken, but whose value is diminished by the regulation of the proposed street.

Section 992 of the Greater New York charter, as amended by chapter 548 of the Laws of 1910, provides that the owners of land improved within the proposed street and extending to the center line thereof may without compensation and before the appointment of commissioners convey their right, title and interest therein to the city of New York. After such cession “No proceedings to open the lands so conveyed shall be taken or maintained, nor shall the lands fronting on that portion of the streets so conveyed, and extending to the center of the block on either side of such portion of said street so

conveyed, be chargeable with any portion of the expense of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid."

The question to be determined in the case at bar is whether after cession duly made the owner so ceding is exempt from all further charges in the proceeding except his share of the awards for buildings actually taken, or whether he may be also charged with his share of damages to the buildings injured by the regulation of the street.

The object of the clause with regard to cession is clear. It is to encourage the conveyance to the city of land required, thereby saving the trouble and expense involved in its condemnation. It makes little difference to other owners who are to pay for the improvement whether the total assessment is increased by the purchase of such land and the number of those who pay the assessments is also increased by the inclusion of its owner, or whether the land is obtained as a gift and the owner is freed from an assessment for other land taken, as a reward therefor. The provision is a reasonable one and comes well within the theory upon which local assessments are imposed.

The legislature, however, has said that where more than the actual land is required, where buildings situated within the proposed street lines are also to be taken, then the owner who has made a cession shall be required to pay his proportion of the award made for them. This is just. The cession has no relation to awards of this character.

Does not the same thing apply where buildings are not actually taken but where they are injured by the improvement? Again there is no relation between the benefits received and the suggested relief.

Coming now to the act itself, its language is clear. The ceding owner is still to pay "the due proportion of the awards that may be made for buildings as aforesaid."

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construed as it must be against a property owner claiming an exemption from taxation — must be held to cover awards for such injuries.

But we have in addition the use of the words "as aforesaid."

We must, therefore, turn to the prior sections of the statute — in this case to section 980. The commissioners are directed to ascertain the compensation that ought justly to be made for "lands, tenements and hereditaments required for the improvement" meaning thereby compensation for the land and buildings taken. If the commissioners shall judge that any intended regulation will injure any building not required to be taken, they shall make a just and equitable estimate and assessment of the loss and damage, which will accrue by consequence of such intended regulation to the respective owners, and the recompense for such loss and damage shall be included by the commissioners in their report and in the assessments subsequently made.

We have, therefore, awards for buildings actually taken and awards for buildings not taken but injured by the improvement. We think that the words as "aforesaid" apply to both.

Some verbal criticism is made of the language employed in section 992. It is said the term "awards for buildings" is not strictly applicable where buildings are not taken; that the phrase "awards to buildings" would have been used had the legislature in mind the latter class of cases. This language, however, would have been at least equally inaccurate. No award is made to a building. The award is made to the owner for the damages which accrue to him.

It is also said that the history of the act shows that the phrase used in section 992 was not intended to cover this last class of awards; that section 992, originally in substantially the form which it now bears preceded section 980, and consequently the words "as aforesaid" at that

time could have had no reference to buildings injured but not taken. That being so we should not give to those words an enlarged construction, because upon a re-arrangement of the statute the order in which the sections appear was changed. There is some force to this contention. There would be more if in the section of the act of 1880 from which they are taken they were not meaningless; if the act of 1880 was not then incorporated piecemeal into the Consolidation Act, carrying these words with it or if the language of the present charter were uncertain and indefinite. We think that where the legislature has itself re-arranged the statute under such circumstances we should give the language employed by it a natural and not a forced construction.

In the case at bar the Special Term and the Appellate Division have held that no assessment could be made against a person ceding land for a proposed street with respect to buildings injured and not taken. In this we think error was committed.

The respondents contend that the sections of the charter allowing assessments for damages awarded by reason of a future contemplated change of grade are unconstitutional. Similar sections, however, have been on the statute books since 1816; they have been considered, construed and enforced in many cases; their validity on constitutional grounds has never been questioned. We cannot overthrow them now.

We must, therefore, hold that the order appealed from should be reversed as to the appellant Mary Alice Dean, with costs in all courts. As to the other persons affected by this proceeding, they have not appealed and as to them the report is final and conclusive. (Charter, § 998.) The city is not interested in the distribution of the assessment among the different owners, nor does it represent them here.

HISCOCK, Ch. J., COLLIN, HOGAN and CARDENZO, JJ., concur; CHASE and CRANE, JJ., dissent.

Order reversed, etc.

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**JOHN L. KINNEY, Appellant, v. JOHN W. KINNEY,
et al., Respondents.**

Contract — real property — action to set aside deed of farm from plaintiff to his nephew, made in consideration of the latter's promise to support and care for plaintiff during life — partial breach of such contract by nephew — duties and obligations of grantee — grantor entitled to lien upon premises.

This action was brought to set aside a deed of conveyance of a farm from the plaintiff to his nephew, the consideration of which was the latter's agreement, among other things, to properly support and care for the plaintiff during life, furnish him with spending money not to exceed one hundred and fifty dollars in any one year, and upon his death to pay his funeral expenses. The performance of these conditions was made a lien upon the premises. *Held*, that the grantee in such a conveyance is bound to furnish the support in accordance with the agreement, without any demand therefor, but where the grantee has made substantial provision for support, which has been accepted by the grantor, the absence of any complaint or demand may be considered in determining whether the grantee has substantially performed his obligation. *Held, further*, that upon the facts found, the nephew was in default as to a part of his agreement and the plaintiff, by reason thereof, is entitled to some relief, and that under its terms he is entitled to a lien upon the premises for a reasonable amount of clothing and spending money not exceeding that mentioned in the agreement, which the nephew has failed to furnish, and in addition thereto is entitled, in the exercise of the court's discretion, to have a proper amount fixed and determined for his board and lodging, clothing and spending money, based upon his expectancy of life, which sums shall also be a lien upon the premises.

Kinney v. Kinney, 162 App. Div. 986, reversed.

(Argued March 29, 1917; decided June 12, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 5, 1914, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

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S. Wallace Dempsey for appellant. The failure of the plaintiff to perform for twelve years any of the things which he bound himself by his contract to do and his refusal upon request to do things which he was asked to do constituted a breach of the contract. (*Davis v. Davis*, 81 Vt. 259; *Abbott v. Saunders*, 80 Vt. 179; *Dixon v. Milling*, 43 L. R. A. 917; *Glocke v. Glocke*, 89 N. W. Rep. 118; *Lewis v. Wilcox*, 108 N. W. Rep. 536.) The failure of the defendants to perform gives plaintiff the right to have his lien fixed. Refusal was not necessary, but refusal was established. (*Storey-Beacher Lumber Co. v. Burnett*, 123 Pac. Rep. 66; *Thomas v. Thomas*, 24 Oreg. 251; *Taylor v. Mason*, 9 Wheat. 325; *Ebert v. Gildermeister*, 106 Minn. 83; *Davis v. Davis*, 81 Vt. 259; *Russell v. Robbins*, 139 A. S. R. 342; *Abbott v. Saunders*, 80 Vt. 179; *Stehle v. Stehle*, 39 App. Div. 440; *Matter of Hess*, 110 App. Div. 476.) Demand was not necessary to entitle plaintiff to his support or to have his lien fixed for the amount of it, defendants having failed to furnish it. (*Barnes v. Barnes*, 9 Mackey, 479; *Bogie v. Bogie*, 41 Wis. 209; *Richter v. Richter*, 111 Ind. 456; *Patterson v. Patterson*, 81 Iowa, 626; *Dixon v. Milling*, 43 L. R. A. 916; *Pettee v. Case*, 2 Allen, 548.) Plaintiff is not confined to foreclosure, but can claim, as well, rescission of the contract and to have the deed set aside. (*Davis v. Davis*, 81 Vt. 259; *Anderson v. Gaines*, 156 Mo. 665; *Dixon v. Milling*, 43 L. R. A. 916.) The failure of defendants to furnish plaintiff a home and to relieve him of business cares entitled the latter to rescind the contract and to have the deed set aside. (*Davis v. Davis*, 81 Vt. • 259; *Russell v. Robbins*, 139 A. S. R. 342; *Abbott v. Saunders*, 80 Vt. 179; *Dixon v. Milling*, 43 L. R. A. 917.)

Irving W. Cole for respondents. The evidence amply supports the findings that there was no such breach of the condition upon which the conveyance was made as to

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furnish grounds for the enforcement of the lien, or for any other relief. (*Spaulding v. Hallenbach*, 39 Barb. 79; 35 N. Y. 204; *Mott v. Richtmeyer*, 57 N. Y. 49; *Cunningham v. Parker*, 146 N. Y. 29; *Post v. Weil*, 115 N. Y. 361; *Graves v. Deterling*, 120 N. Y. 447; *Lyon v. Hersey*, 103 N. Y. 264; *Freer v. Glenn Spring Sanitarium Co.*, 131 App. Div. 352; *Herrick v. Starkweather*, 54 Hun, 532; *Bohlerber v. Waelden*, 80 Hun, 349; *Wilson v. Deen*, 74 N. Y. 531.)

McLAUGHLIN, J. This action was brought to set aside a deed of conveyance from the plaintiff to his nephew, the defendant John W. Kinney, the consideration of which was the latter's agreement to, among other things, properly support and care for the plaintiff during life, and upon his death to pay his funeral expenses. There have been two trials. The first resulted in a judgment setting aside the deed on the ground of the nephew's failure to perform the agreement. On appeal the same was reversed as against the weight of evidence and a new trial ordered (152 App. Div. 901). The second trial resulted in a judgment dismissing the complaint upon the merits, which, by a divided court, was affirmed, and the plaintiff appeals to this court.

There is no substantial dispute between the parties as to the material facts involved. In 1883 the plaintiff, a veteran of the Civil War, purchased a small farm in Niagara county, N. Y., and thereafter, with his wife, lived upon it until her death, which occurred in May, 1899. They had no children, and the plaintiff, who was then sixty-two years of age, was greatly affected and much depressed by her death. Subsequently, the defendants, who resided in a home of their own in Buffalo, N. Y., went to live with and care for the plaintiff on his farm and they there remained several months. During that time the relations between the parties were very close, and the plaintiff being apparently so well satisfied with

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- the arrangement, suggested that if his nephew would let him live with them, support him for the rest of his life, give him proper clothing, a certain amount of spending money, and provide a proper burial at death, he would give the farm and personal property thereon to him. When the matter was first suggested the nephew was unwilling to enter into such an arrangement. The farm was worth not more than \$5,400, and was subject to a mortgage of \$1,500. He was employed at the time as a fireman, earning \$85 a month. The proposed arrangement, therefore, seemed of doubtful financial advantage to him. However, he finally consented to it and on September 13, 1899, they went to an attorney who prepared a deed of the farm, a bill of sale of the personal property thereon, worth from seven to eight hundred dollars, and an agreement by which, in consideration of the conveyance and transfer, the nephew assumed the payment of
- the mortgage, agreed to pay the taxes thereafter assessed on the farm, keep the buildings and fences in good repair during plaintiff's life, and also agreed "that he will board and lodge said party of the first part during his lifetime in his family, upon said premises or elsewhere if his family shall not live thereon, and that he will clothe said first party during his lifetime according to his habit of living and will furnish said party spending money from time to time as he shall require it during his lifetime, but not to exceed in any one year the sum of one hundred dollars; and that in case of sickness of said party of the first part he will pay the necessary expenses of his sickness and at his death will pay his funeral expenses." To insure the faithful performance of its covenants, the agreement on the part of the nephew was made a lien
 - upon the premises, the deed reciting "the performance of which is made a lien and charge on the said premises." Immediately following the execution of the instruments, the defendant and his wife moved their effects from their home in Buffalo to the plaintiff's farm, where they all

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lived together until the following spring, when it seemed best to all of the parties to let the farm on shares and remove therefrom to Buffalo. The personal property upon the farm was thereupon sold, with the consent and active co-operation of the plaintiff, and in May or June of that year they went to Buffalo and took up their residence in the nephew's home.

As to what subsequently took place between them, the findings are somewhat conflicting, and the appellant is entitled to the benefit of those most favorable to him. (*Whalen v. Stuart*, 194 N. Y. 495.) The material facts, however, are clearly set forth, from which it appears that the plaintiff remained with his nephew in Buffalo only a few weeks, when he returned to the farm, and at the request of the nephew, attended to its management. Since that time the farm has continued to be let on shares and the plaintiff, except for a short time between 1907, when he married a second time, and 1909, has continued to live on the farm and manage the same, accounting to his nephew for the proceeds, or the greater part thereof. Prior to the commencement of this action (1910) he had applied practically all of the income from the farm to the payment of the taxes and insurance thereon, and had paid and satisfied in full the principal and interest of the mortgage referred to. While he occasionally visited the defendants, he did not board or lodge with them except for an aggregate of about seventeen weeks during the ten years the agreement had been in force. Meanwhile, the nephew furnished him with only one suit of clothes costing \$16, and gave him spending money only to the amount of \$20. He has never gone to the plaintiff and offered him spending money, or inquired whether he needed clothing, and on several occasions when plaintiff asked for spending money he put him off with excuses until plaintiff gave up asking for it.

Not only this, but the court found as a fact that the plaintiff "did not always receive kind and con-

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siderate treatment from the defendant John W. Kinney and his family" on his visits to them, and that his relations with his nephew "have become strained to the point that they do not speak, either of them to the other, so that John W. Kinney himself believes that plaintiff could not now be made reasonably comfortable and happy boarding and lodging in the family of John W. Kinney."

- It is obvious from these facts and others found that the purpose of the conveyance and agreement has not been, and cannot now be carried out. The parties undoubtedly expected, when the agreement was made, to live together on the farm for the rest of plaintiff's life, the nephew assuming the burden of running it. This is evident from the fact that the nephew moved from Buffalo to the farm immediately after the instruments were executed, though he did not give up his work as a fireman, which occupied approximately one-half of his time. While the nephew was not bound, under the agreement, to remain on the farm, it is quite apparent that the plaintiff was not a welcome inmate of his house after he moved back to Buffalo, and aside from the plaintiff's remarriage, their relations now are such that it is not practicable or desirable for the plaintiff to board and lodge with defendants' family. The plaintiff, instead of having a home provided for his declining years, as was contemplated when the conveyance and agreement were executed, has managed the farm just as he would have done had he not given it to his nephew; and while the latter has advanced something over \$570 for the farm and to the plaintiff, the proceeds derived from the farm and sale of the personal property have more than repaid him, so that, as the court found, the conveyance of the farm and the transfer of the personal property have been to the financial advantage of the nephew.

Clearly, the plaintiff has not received the consideration to which the agreement entitled him. He conveyed his

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farm and everything that he owned in order to insure himself a home in defendants' family and clothes and spending money for the rest of his life, and he has, for practically the entire time since the agreement was made, remained on the farm alone, apparently dependent upon his pension as a veteran for his clothes and spending money. Like most agreements of this kind, the contemplated arrangement has not worked out satisfactorily to any of the parties, and it remains for the court to consider to what, if any, relief, under the circumstances, the plaintiff is entitled.

It is urged, in the first place, on the part of the respondents, that no default on the part of the nephew has been shown, since it does not appear that the plaintiff ever made any specific demand for different treatment. This, apparently, was the ground upon which the first judgment in plaintiff's favor was reversed, the court holding: “(1) That the finding of the trial court that the appellant abandoned the contract was contrary to and against the weight of the evidence; (2) that there was no such refusal of performance on the part of the appellant as to entitle the plaintiff to rescind the contract and set aside the deed of the farm.” (152 App. Div. 901.)

The conclusion thus reached, in so far as it relates to the nephew's obligation to board and lodge the plaintiff, is undoubtedly correct, since the plaintiff left defendants' family voluntarily and apparently was willing to go back to the farm, and from the income derived therefrom the nephew has allowed him his board and lodging. While this was not in accordance with the agreement, nevertheless it was, by mutual arrangement, a substantial substitute for the same, and, in the absence of any complaint or demand on the part of the plaintiff, it may be considered as showing that he was satisfied. (*Calhoun v. Calhoun*, 49 App. Div. 520.) There are, however, authorities that in cases of this kind the grantee is bound to perform the agreement which is the consideration for the

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deed, and that no demand is necessary to put him in default. (*Stehle v. Stehle*, 39 App. Div. 440; *Richter v. Richter*, 111 Ind. 456; *Bogie v. Bogie*, 41 Wis. 209; *Barnes v. Barnes*, 20 D. C. [9 Mackey] 479.)

In *Stehle v. Stehle* (*supra*), upon facts somewhat similar to those here presented, the trial court dismissed the complaint upon the ground that no demand for support had been shown, but the judgment was reversed on the ground that it was the defendant's duty to furnish support as the consideration for the deed, without any demand.

In *Calhoun v. Calhoun* (*supra*) a judgment in favor of the plaintiff was reversed on the ground that substantial provision for support had been made and no demand for other or additional support had been shown.

But the distinction between these two cases, and it seems to me the true rule, is that the grantee in such a conveyance is bound to furnish the support in accordance with the agreement, without any demand therefor, but that where the grantee has made substantial provision for support, which has been accepted by the grantor, the absence of any complaint or demand may be considered in determining whether the grantee has substantially performed his obligation.

In the present case it appears that the grantee has complied with his obligation to furnish board and lodging, not in the manner provided in the agreement, but in a substantial way, which, so far as appears, was satisfactory to the plaintiff. But notwithstanding that fact it cannot be asserted with reason that the nephew has substantially complied with his agreement to furnish the plaintiff with proper clothing and spending money. As to the latter, specific demands were made from time to time, which, if not refused, were at least never complied with. The nephew, therefore, was in default as to a part of his agreement and the plaintiff, by reason thereof, is entitled to some relief.

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In cases somewhat similar to this the courts have applied different rules as to the relief to be granted. (Pomeroy on Equitable Remedies, vol. 2, § 686; Black on Rescission and Cancellation of Contracts, § 168; *Dixon v. Milling*, 43 L. R. A. [N. S.] 916 and note.) No extended consideration of that question is necessary, however, because the agreement and deed both provided that the performance of the agreement should be a lien and charge upon the premises. The performance of the agreement was not made a condition of the deed as it might have been (*Spaulding v. Hallenbeck*, 35 N. Y. 204), and the express provision for a lien, as it seems to me, necessarily precludes the plaintiff from claiming the rescission of the contract and was obviously intended to specify the remedy for any breach of the agreement. It has been held that even without such specific provision, where the facts do not entitle the grantor to a reconveyance, a lien may, nevertheless, be declared and enforced against the premises. (*Redpath v. Redpath*, 75 App. Div. 95; *Grote v. Grote*, 121 App. Div. 841; *Stehle v. Stehle, supra*.)

Upon the facts found, therefore, I am of the opinion that the plaintiff is entitled to a lien upon the premises for a reasonable amount for clothing and spending money not exceeding that mentioned in the agreement, which the nephew has failed to furnish. Since it clearly appears that the relations between the parties are such that the agreement is no longer capable of being specifically performed, certain provisions should be made for the future. As was said in *Matthews v. Matthews* (133 N. Y. 679, 682), "When we recall the peculiar character of this contract, which contemplated a living together in home relations of the parties, a residence under one roof, a daily meeting at one table, and the continual association of personal care on one side and benefits bestowed on the other, it becomes apparent that a decree of specific performance possible of execution would have perpetuated and intensified an amount of strife and discord likely to end in violence and

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utterly destructive of the real and beneficial purposes of the contract. The discretion of a court of equity would hardly be exercised to chain together the belligerents and call it making a home." Since the agreement under consideration can no longer be specifically performed and has been broken at least in part by the nephew, I think the plaintiff is entitled, in the exercise of the court's discretion, to have a proper amount fixed and determined for his board and lodging, clothing, and spending money, based upon his expectancy of life, and to have such amount declared to be a lien upon the premises, in addition to the amounts before suggested. I know of no other way in which the controversy between these parties can be satisfactorily settled.

Since there must be a new trial it may not be out of place to indicate, if the facts then established are the same as those presented on the present appeal, the judgment to be entered. It should determine and declare the amount of the lien and direct its enforcement by a sale of the premises, with a personal judgment against the nephew, John W. Kinney, for any deficiency, but since the plaintiff has, in his complaint, demanded a rescission of the agreement and a reconveyance of the land, John W. Kinney should be given an opportunity, before such sale, to reconvey the premises to the plaintiff in full satisfaction of all liability of the said defendant to him under the agreement.

The judgment appealed from, therefore, should be reversed and a new trial ordered, with costs to the appellant to abide the event.

CHASE, HOGAN and ANDREWS, JJ., concur; HISCOCK, Ch. J., and CARDOZO, J., concur in voting to reverse the judgment, but are of the opinion that since there was no abandonment of the contract, the amount of the lien should be restricted to the sum now due for clothes and spending money; POUND, J., not sitting.

Judgment reversed, etc.

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JAMES S. HERRMAN, Respondent, *v.* UNITED STATES TRUST COMPANY OF NEW YORK et al., as Administrators with the Will Annexed of FRANCIS L. LELAND, Deceased, Appellants.

Appeal—judgment or order on appeal to Appellate Division—power of Appellate Division to review the facts and render a new final judgment in cases of contract and in tort cases—when Appellate Division has the power to reduce the verdict and grant judgment for a smaller amount.

In an action to recover on contract, the jury rendered a verdict in favor of the plaintiff, which the judge presiding set aside as excessive, and granted a new trial. The Appellate Division reversed the order of the trial judge and reinstated the verdict, but with the consent of the plaintiff reduced the same and ordered judgment for that amount in favor of the plaintiff. Judgment was entered accordingly, from which the defendants now appeal. *Held*, that there is now no distinction between the power of the Appellate Division in contract cases and tort cases to render final judgment such as the trial court should have given. That court now has the power, with the consent of the party in whose favor the verdict was rendered, to reduce a verdict and grant judgment for a smaller amount. (Rule in *Whitehead v. Kennedy*, 69 N. Y. 462, abrogated by section 1817, Code of Civil Procedure, as amended by chapter 380, Laws of 1912.)

Herrman v. Leland, 168 App. Div. 515, affirmed.

(Argued May 10, 1917; decided June 12, 1917.)

APPEAL from a judgment entered July 30, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and directed that in the event that plaintiff should stipulate to reduce his recovery to a sum stated that judgment should be entered in his favor for that amount.

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Points of counsel.

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The nature of the action and the facts, so far as material, are stated in the opinion.

L. Laflin Kellogg, George L. Shearer, Joseph McCloskey and *Jesse Grant Roe* for appellants. The court below, while holding that the verdict rendered by the jury was excessive, and to that extent erroneous, without ordering a new trial, fixed a definite and arbitrary amount to which, in its opinion, the verdict should be reduced, and, on the plaintiff's stipulation to accept such reduction, directed judgment in his favor therefor, which it had no power to do. (*Moffet v. Sackett*, 18 N. Y. 522; *Whitehead v. Kennedy*, 69 N. Y. 462; *Andrews v. Tyng*, 94 N. Y. 16; *Matter of Application of Knapp*, 85 N. Y. 284; *Porter v. Dunn*, 141 N. Y. 314; *Lawrence v. Church*, 128 N. Y. 324; *Matter of Chapman*, 162 N. Y. 456; *Van Beuren v. Wotherspoon*, 164 N. Y. 368; *Holmes v. Jones*, 121 N. Y. 464.) The power granted to the Appellate Divisions by the amendment to section 1317 of the Code does not authorize such action, when the trial has been before a jury and the right to a jury trial has not been waived. (*Bonnette v. Molloy*, 209 N. Y. 167; *Lamport v. Smedley*, 213 N. Y. 82; *Acme Realty Co. v. Schinasi*, 215 N. Y. 495; *Middleton v. Whitridge*, 213 N. Y. 499; *Baldwin & Co. v. Kohler*, 94 Misc. Rep. 142.)

Richard T. Greene, Francis R. Stoddard, Jr., and Daniel S. Murphy for respondent. The Appellate Division had power to order that the verdict be reduced to \$14,980.98 on the plaintiff's stipulation that it be so reduced. (*Hayden v. F. S. M. Co.*, 54 N. Y. 221; *Weed v. Lee*, 50 Barb. 354; *Korn v. Freedlander*, 156 App. Div. 901; 215 N. Y. 642; *Koehler v. Hughes*, 148 N. Y. 507; *Dibble v. Dimick*, 143 N. Y. 549; *Randall v. N. Y. El. R. R. Co.*, 149 N. Y. 211; *Rosenstein v. Fox*, 150 N. Y. 354; *Kaplan v. N. Y. Biscuit Co.*, 151 N. Y. 171;

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Pringle v. Long Island R. R. Co., 157 N. Y. 100; *Spence v. Ham*, 163 N. Y. 220; *Morehouse v. Brooklyn Heights R. R. Co.*, 185 N. Y. 520; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521.)

CUDDEBACK, J. This is an action to recover on contract, which was tried before a jury. The jury rendered a verdict of \$17,051.30 in favor of the plaintiff, which the judge presiding set aside as excessive, and granted a new trial. The court at the Appellate Division reversed the order of the trial judge and reinstated the verdict, but with the consent of the plaintiff reduced the same to \$14,980.98, and ordered judgment for that amount in favor of the plaintiff. Judgment was entered accordingly, from which the defendants now appeal.

The defendants, the appellants, contend that the court at the Appellate Division had no authority to give final judgment against them for the amount of the verdict as reduced, but should have permitted a new trial, and that any contrary ruling was an encroachment on the functions of the jury. The respondent argues that the amendment to section 1317 of the Code of Civil Procedure made by chapter 380, Laws of 1912, which was designed to prevent delay in legal procedure occasioned by unnecessary re-trials of the same issue, gave the Appellate Division power to grant the final judgment appealed from. The amendment to section 1317 provides that the Appellate Division may affirm, reverse or modify the judgment or order appealed from and render "final judgment upon the right of any or all of the parties."

The appellants rely upon the decision of this court in *Whitehead v. Kennedy* (69 N. Y. 462), which holds, just as they contend, that in actions *based upon contract* the Appellate Division, or the General Term, as it then was, cannot reduce a verdict and give final judgment for

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a lesser sum, as was done in this case, unless the verdict includes several separate and distinct items, but if not satisfied with the judgment or order of the Trial Term should grant a new trial. The decision recognizes, however, that a contrary rule exists in actions based upon wrongs to reduce the recovery with the consent of the party in whose favor it was had. The appellants cite several other decisions to the same effect as *Whitehead v. Kennedy* (*supra*). The ground of these decisions is that the law has not given to the Appellate Division the power on appeal to render final judgment.

Whitehead v. Kennedy (*supra*), as well as every other case cited by the appellants, was a case wherein the trial was had before a referee. We held substantially in *Lamport v. Smedley* (213 N. Y. 82) that in all such cases where the trial was had before the court or a referee the amendment made to section 1317 by chapter 380, Laws of 1912, invested the Appellate Division with power to render whatever new decree justice required. The result of that decision was that the rule of law laid down in the *Whitehead* case and similar cases, as to the power of the Appellate Division to give final judgment in actions tried before the court or a referee, was abrogated.

With the rule laid down in the *Whitehead* case thus abrogated by statute, I find no authoritative holding that the Appellate Division in contract cases has no power to reduce a verdict and grant judgment for a smaller amount, with the consent of the party in whose favor the verdict was rendered. There is abundant authority for holding, as was said in the *Whitehead* case, that the Appellate Division has such power in cases of wrongful injury to persons or property. (*Murray v. Hudson R. R. Co.*, 47 Barb. 196; 48 N. Y. 655; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521, 538; *Smith v. Dempsey*, 102 N. Y. 655; *Dembitz v. Orange County Traction Co.*, 147 App. Div. 588.) I see no reason why there should be any distinction made between the power of the Appellate

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Division in contract cases and tort cases, and in my judgment the amendment to section 1317 of the Code has abolished the distinction.

Such a conclusion seems to be justified by the decision in *Middleton v. Whitridge* (213 N. Y. 499, 507). The trial there had been before a jury and the effect of the amendment to section 1317 was under consideration. The court said:

“The final judgment then which the Appellate Division is empowered to render is the one which the trial court should have rendered either upon a special or a general verdict, or upon a motion to dismiss the complaint or to direct a verdict. The error thus corrected is the error of the court, not of the jury. The province of the jury is not invaded by the correction of such an error and the rendition of the judgment which ought to have been rendered by the trial court.”

The trial court, in the case before us for decision, had power, instead of setting aside the verdict and ordering a new trial, to reduce the verdict, with the consent of the plaintiff, and direct judgment for the amount to which it was reduced. (*Branagan v. L. I. R. R. Co.*, 28 App. Div. 461.) The power to thus reduce verdicts at the Trial Term is too well settled and has been followed too long to be questioned now. It is said to be a power inherent in the court. (Id.) Such a judgment is just what the Appellate Division said the trial court should have rendered in this case.

As was said in *Middleton v. Whitridge (supra)*, that practice does not lead to any encroachment upon the functions of the jury. The defendants had their case tried by the jury once, and they have no constitutional right to two jury trials. The jury rendered its verdict, and the defendants, not satisfied therewith, moved to set the verdict aside. The trial court granted the motion but the Appellate Division reversed that decision. As some measure of relief, however, the Appellate Division cut

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down the recovery against the defendants, with the consent of the plaintiff. The defendants' real grievance is that there was any recovery at all on behalf of the plaintiff, and the ruling of the Appellate Division was in their favor so far as it reduced the amount of the recovery. (See *Korn v. Freedlander*, 166 App. Div. 686; 215 N. Y. 642.)

The amendment of 1912 to section 1317 of the Code was made to simplify legal practice and to do away with one cause of unnecessary delay in litigation. We should give the enactment the full force and effect to which it is justly entitled.

I recommend that the judgment appealed from be affirmed, with costs.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDODOZO and McLAUGHLIN, JJ., concur.

Judgment affirmed.

JAMES E. ANDREWS, Appellant, *v.* GEORGE COHEN,
Respondent.

Appeal — when Appellate Division reverses or modifies judgment of Trial Term on the facts, it must make findings necessary to support the judgment it orders — Court of Appeals may review without exceptions — estoppel — easements — when facts insufficient to show that owner of easement is estopped from maintaining action to restrain obstruction to easement — when right of way in city may be covered if easement is not injured.

1. Where the Appellate Division reverses or modifies a judgment of the Trial Term and orders a judgment proceeding on a different theory of the facts, it must make such additional findings as are necessary to support the judgment which it has ordered. No exception need be taken to these findings to entitle them to be reviewed in the Court of Appeals. If there is evidence to sustain them this court cannot interfere provided they justify the judgment which the Appellate Division directs.

2. An estoppel may arise either where the owner of an easement knowing that another, in the belief that he has the right to do so, is, at expense to himself, occupying the land over which the easement

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passes by building thereon or otherwise and yet stands by without objection, or where he makes representations to another with the intention that the other may act thereon or which fairly justify the other in so acting, and the other takes action upon the faith of such representations. The findings by the Appellate Division neither separately nor together state facts from which such an estoppel arises.

3. In the absence of restriction in the grant the owner of the servient tenement in a city has the right to cover a right of way so long as sufficient headroom is preserved and so long as such action does not make the use of the right of way impracticable or unreasonably inconvenient.

Andrews v. Cohen, 168 App. Div. 580, modified.

(Argued May 16, 1917; decided June 12, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 4, 1914, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alton B. Parker and *Henry T. Fay* for appellant. The plaintiff has a property right in the right of way of which he cannot be deprived in any other way than those clearly recognized by the law without an invasion of his constitutional rights. (*Wynkoop v. Burger*, 12 Johns. 222; *Lampman v. Milks*, 21 N. Y. 505; *Curtis v. Ayrault*, 47 N. Y. 75; *Hamilton v. White*, 4 Barb. 60; 5 N. Y. 9; *Doyle v. Lord*, 64 N. Y. 432; *Evangelical, etc., Home v. Buffalo, etc., Association*, 64 N. Y. 561; *Onthank v. Lake Shore & M. S. R. R. Co.*, 71 N. Y. 194; *Welsh v. Taylor*, 50 Hun, 137; 134 N. Y. 450; *Niagara Falls v. R. R. Co.*, 41 App. Div. 93; 168 N. Y. 610; *Vil. of Olean v. Steyner*, 135 N. Y. 341.) The right of way owned by the plaintiff cannot be changed or altered by the defendant as owner of the servient estate. (*Hines v. Hamburger*, 14 App. Div.

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577; *Ruppert v. St. Marys*, 131 App. Div. 564; 198 N. Y. 576; *Smith v. Ball*, 143 App. Div. 83; *Stephens v. N.Y., O. & W. R. R. Co.*, 175 N. Y. 80; *Collins v. Buffalo Furnace Co.*, 73 App. Div. 22; *Tyler v. Porter*, 4 Hill, 140; *Matter of Deansville Cemetery*, 66 N. Y. 569; *Waterloo v. Shoreham*, 128 N. Y. 345.) The relief to which the plaintiff is entitled is clearly a mandatory order of injunction for the removal of the obstructions and against their continuance. (*Wheeler v. Gilsey*, 35 How. Pr. 139; *Evangelical Home v. B., etc., Assn.*, 64 N. Y. 561; *Ward v. Warren*, 82 N. Y. 265; *Nicholas v. Wentworth*, 100 N. Y. 455; *McMillan v. Tower*, 24 N. Y. Supp. 951; *Dexter v. Beard*, 25 N. Y. S. R. 664; *Barron v. Korn*, 127 N. Y. 324; *Hay v. Knauth*, 36 App. Div. 612; *Weed v. Donohue*, 26 App. Div. 360; *Valentine v. Schreiver*, 3 App. Div. 235.) The defendant, in this case, is not entitled to build over this right of way and the plaintiff is entitled to have all such structures also removed. (*Grafton v. Moir*, 130 N. Y. 465.) The plaintiff is not in any way precluded from obtaining the relief to which he is entitled. (Abbott's Brief on Pl. §§ 775-881; *Ackerman v. True*, 175 N. Y. 353.) To allow damages in lieu of a mandatory injunction would be a violation of the plaintiff's constitutional property rights. (*Knoth v. Manhattan Co.*, 187 N. Y. 243; *Bremer v. Manhattan Co.*, 191 N. Y. 334; *McClane v. Leaycroft*, 183 N. Y. 30; *Collins v. Buffalo Furnace Co.*, 73 App. Div. 22; *Blenis v. Utica*, 73 Misc. Rep. 61; *Kelly v. Penfield*, 133 App. Div. 367; *Ackerman v. True*, 56 App. Div. 54; 175 N. Y. 353; *Batchelor v. Hinkle*, 140 App. Div. 621.) The defendant is a trespasser having no standing in a court of equity. (*Lynch v. Union Inst.*, 159 Mass. 306.)

Charles Morschauser and William L. Gellert for respondent. The Appellate Division properly corrected

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vital errors of fact and of law upon which the judgment of the Special Term was based. Under the facts as now established herein the defendant was in equity justified in deflecting the course of the old right of way. The defendant lawfully built over the right of way. (*Grafton v. Moir*, 130 N. Y. 465; *O'Beirne v. Gildersleeve*, 116 App. Div. 902; *Hollins v. Demorest*, 129 N. Y. 676; *Andrews v. Cohen*, 163 App. Div. 580; *Garrish v. Shattuck*, 132 Mass. 235; *Atkins v. Boardman*, 2 Metc. 457; *Bitello v. Lipson*, 16 L. R. A. [N. S.] 193; Jones on Easements, § 397; *Johnson v. Kinnicut*, 2 Cush. 153; *O'Brien v. Murphy*, 189 Mass. 353; *Lipsky v. Heller*, 199 Mass. 310.) The finding of estoppel by the Appellate Division is amply supported by evidence and is conclusive upon this court. The plaintiff has not sustained any damage whatever. The plaintiff "seeks equity," but is unwilling to "do equity." (*Hall v. O'Brien*, 218 N. Y. 50; *Acme Realty Co. v. Schinasi*, 215 N. Y. 495; *Rothschild v. T. G. & T. Co.*, 204 N. Y. 458; *Trustees, etc., v. Smith*, 118 N. Y. 634; *Horton v. Erie Preserving Co.*, 90 App. Div. 255; Pom. Eq. Juris. [3d ed.] §§ 816-821.) The Appellate Division properly modified the judgment appealed from and rendered judgment according to law upon the rights of the parties. As thus modified the judgment justly protects the defendant and awards to the plaintiff such relief as he equitably deserves. (*McCann v. Chasm Power Co.*, 211 N. Y. 301; *Bachelor v. Hinkle*, 210 N. Y. 243; *Crocker v. Manhattan Trust Co.*, 61 App. Div. 226; *Wormser v. Brown*, 149 N. Y. 163; *Gray v. Manhattan Ry. Co.*, 128 N. Y. 499; *McClure v. Leacraft*, 183 N. Y. 36; *Collins v. Buffalo Furnace Co.*, 73 App. Div. 22; *Green v. Richmond*, 155 Mass. 188; *Penrhyn Slate Co. v. Granville*, 181 N. Y. 80; *Knoth v. Manhattan Ry. Co.*, 187 N. Y. 243; *Hall v. O'Brien*, 218 N. Y. 50; *Acme Realty Co. v. Schinasi*, 215 N. Y. 495; *Union Trust Co. v. Oliver*, 214 N. Y. 517; *Lamport v. Smedley*, 213 N. Y. 82.)

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ANDREWS, J. The Special Term has made findings, unanimously affirmed by the Appellate Division, from which it appears that as appurtenant to his property the plaintiff has acquired by grant a certain right of way over the defendant's land; that the latter has substantially obstructed it by building and by placing posts thereon; that he has also covered a portion thereof. These acts prevent the plaintiff from using it, to his damage. He has been compelled to pass around the defendant's building over the latter's land, but he has never accepted this substituted right of way, nor has the defendant ever granted the same to him. Neither verbally nor in writing has the plaintiff ever consented to a surrender or abandonment of his right of way, nor is there any finding of acts on his part from which an abandonment may be inferred.

Thereupon the Special Term directed judgment for the plaintiff. This judgment enjoined the defendant from obstructing or interfering with the right of way in question, or from building thereon or thereover, and it directed him to remove the buildings, posts or other structures upon or over it.

This judgment (except as to covering the right of way, reference to which will be made later) is supported by the findings of fact. It must be sustained unless other facts exist which constitute a defense. If they do they are not found by the Special Term.

The Appellate Division, however, did make certain additional findings, and upon them modified the judgment of the Special Term by dissolving the injunction except in so far as it required the removal by the defendant of the two posts erected by him in the right of way.

Where the Appellate Division reverses or modifies a judgment of the Trial Term and orders a judgment proceeding on a different theory of the facts, it must make such additional findings as are necessary to support the judgment which it has ordered. No exception need be

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taken to these findings. They are to be reviewed by us. If there is evidence to sustain them we cannot interfere provided they justify the judgment which the Appellate Division directs.

We think that the findings so made by the Appellate Division are supported by certain evidence in the case.

The only question, therefore, is as to whether they constitute a defense to the claim of the plaintiff.

An easement once granted may be ended by (1) release; (2) merger; (3) abandonment.

There is no claim here either of an actual release or of one inferred from adverse user. There is no pretense of merger. The Appellate Division has affirmed the finding that "the plaintiff never consented, either verbally or in writing to an abandonment of his right of way or to the defendant's building thereon or thereover." Nor does either court find as a fact that there was an abandonment.

Though an easement may not be ended, yet by acts of the owner of the dominant tenement or in certain cases by his silence where it becomes his duty to speak, he may be estopped from asserting it. Although we do not attempt to lay down any exhaustive definition of equitable estoppel, such an estoppel may arise either where the owner of an easement knowing that another, in the belief that he has the right to do so is, at expense to himself, occupying the land over which the easement passes by building thereon or otherwise and yet stands by without objection; or where he makes representations to another with the intention that the other may act thereon or which fairly justify the other in so acting, and the other takes action upon the faith of such representations.

This apparently the Appellate Division had in mind with regard to the findings made by it. The difficulty is that the findings so made are not sufficient to sustain the defense on either of these theories.

There are five of such findings. The third and fifth are immaterial so far as this question is concerned.

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The first is that as early as October, 1912, the plaintiff and the defendant had general conversations as to the defendant's plans and designs respecting the construction of an entrance from Main street to the auditorium; and in April, 1913, and frequently afterward the plaintiff and the defendant talked of covering over this passageway.

The second is that during the removal of certain buildings there were frequent interviews between the plaintiff and the defendant when the plaintiff made no objection to the proposed alterations.

The fourth is that when the defendant began the removal of the structures upon his land "the plaintiff gave the defendant to understand that he did not object to such changes."

These findings neither separately nor together state facts from which an estoppel arises. There is no statement that the defendant was induced to proceed by the representations or by the silence of the plaintiff. There is no finding of representations upon which the defendant did or had the right to rely. There is no finding of circumstances which made it the duty of the plaintiff to speak. The changes referred to in the fourth finding were the removal of certain structures upon the defendant's own land.

In this case the plaintiff acted promptly. The Appellate Division has approved the finding that this action was begun within a few days from the beginning of building operations upon the right of way. Here the defendant knew of the rights of the plaintiff. Under such circumstances we do not understand that the owner of property is under any duty to speak, or that he loses any rights by silence. A trespasser acts at his peril.

The Appellate Division evidently had in mind also another principle. Although the plaintiff may have a legal title to property a court of equity will at times refuse a mandatory injunction merely for the purpose of

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protecting a technical right where the defendant has acted innocently, and when it will produce great public or private mischief. This rule, however, is to be applied with great caution and never where the property affected is substantial, and where the defendant has full knowledge of the facts. That the rights affected in this case were substantial clearly appears from the findings of the Special Term. That the plaintiff failed to prove the money value of the damages suffered by him to the time of the trial is immaterial.

We must, therefore, hold that the order of the Appellate Division reversing the judgment of the Special Term must be itself reversed except in one respect.

The third finding of the Appellate Division is, among other things, that the defendant has covered the old right of way for a distance of about sixty-three feet leaving a clearance or headroom of eleven and a half feet from the bottom of the girders. It also appears that the original right of way for a short distance was covered by a shed. And the fifth finding is that there is now more headroom for the plaintiff at the covered part thereof than there was at the covered part of the old right of way.

There is no finding made either by the Special Term or the Appellate Division that this action so darkens the right of way as to make its use impracticable or inconvenient. Nor is there anything in the grants under which the plaintiff claims which expressly or impliedly prevents the owner of the servient tenement from covering it over. We do not think that such implication can be drawn from the fact that such right of way was to be used for sleighs and that covering it might prevent the fall of snow thereon in winter. In the absence of such restriction the owner of the servient tenement in a city always has the right to cover a right of way so long as sufficient headroom is preserved and so long as such action does not make the use of the right of way impracticable or unreasonably inconvenient.

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In our opinion, therefore, so much of the judgment of the Special Term as forbids the defendant from covering such right of way in a reasonable manner should be reversed and that of the Appellate Division affirmed. In all other respects the judgment of the Appellate Division should be reversed, without costs to either party in this court.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND and CRANE, JJ., concur.

Judgment accordingly.

BARKIN CONSTRUCTION COMPANY, Respondent, v. EDMUND L. GOODMAN et al., Copartners under the Firm Name of BRAISTED, GOODMAN & HERSHFIELD, Appellants.

Pledge — corporation — when pledge of rental of apartment house, owned by corporation, as security for loan, the proceeds of which were used for the benefit of the corporation, valid.

In an action brought by a corporation, owning an apartment house, against its renting agents for a balance of rent in their hands, the defendants proved an agreement by which the rent was to be held as security for a loan made by them, the proceeds of which loan were applied to the payment of interest on a mortgage upon the property of the company. The transactions regarding the loan were conducted by a former president of the company, whose wife was the owner of the majority of the stock and was then president of the corporation, in the presence of and with the tacit approval of the secretary, who was intrusted with the general management of the business of the company. *Held*, error for the court to hold the agreement of no effect and direct a verdict for the plaintiff. The evidence justified a finding that the loan, though made in form to the former president in person, was for the benefit of the company and the situation was one where property of the company could lawfully be pledged as security, and enough was proved to permit a jury to say that the pledge was within the scope of the secretary's powers.

Barkin Const. Co. v. Goodman, 167 App. Div. 899, reversed.

(Argued May 22, 1917; decided June 12, 1917.)

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 11, 1915, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry Siegrist, Edward Lauterbach and Melville H. Cane for appellants. The fact that plaintiff received the fruits of the transaction and used the \$5,000 for its own benefit supported the inference that the persons then purporting to represent the plaintiff were authorized to bind it by the arrangement made. In any event an inference that plaintiff ratified and adopted the arrangement with full knowledge of the details thereof through Berman, its secretary, was clearly permissible. The general rules of law relating to contracts and property rights apply to corporations as well as to individuals, and the principles of the law of agency apply to both alike. (*Martin v. N. F. P. Mfg. Co.*, 122 N. Y. 165; *Young v. U. S. Mort. & Trust Co.*, 214 N. Y. 279; *Dickinson v. Salmon*, 36 Misc. Rep. 169; *Dunn v. Hornbeck*, 72 N. Y. 80.) A corporation is bound as to third persons by acts within the apparent scope of the agent's authority and is estopped from denying the agent's authority by permitting him to assume authority to represent it. (*People v. Rochester Ry. & L. Co.*, 195 N. Y. 102; *Mechem on Agency*, §§ 84, 279, 280, 282, 283; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Diamond Soda Water Co. v. Hegeman & Co.*, 74 App. Div. 430; *Wilson v. Kings Co. El. R. R. Co.*, 114 N. Y. 487; *Hanover Bank v. American Dock & Trust Co.*, 148 N. Y. 612; *Goldstein v. Godfrey Co.*, 70 Misc. Rep. 235, 236; *Howell v. Edwards Co.*, 36 N. Y. S. R. 803; 129 N. Y. 625.) Irrespective of any authority of Barkin there was a contract with plaintiff implied in fact, arising from the acquiescence of Berman, the secretary, who concededly was vested with extensive powers, the

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business arrangements of the corporation being left to him by the president. (*Miller v. Schloss*, 218 N. Y. 400; *Cohen v. Siegel-Cooper Co.*, 172 App. Div. 21; *Ellis v. Howe Machine Co.*, 9 Daly, 78; *Hoyt v. Thompson*, 19 N. Y. 207, 218; *O'Grady v. Howe & Rogers Co.*, 166 App. Div. 552; 2 Morawetz on Private Corp. [2d ed.] 618; *Sheldon H. B. Co. v. E. H. B. M. Co.*, 99 N. Y. 607; *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113.)

J. A. Seidman for respondent. There was not a scintilla of proof to show that plaintiff held out Barkin as its agent so as to estop it from denying his alleged agency. (*Maguire v. Seldon*, 103 N. Y. 642; *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154; *Edwards v. Dooley*, 120 N. Y. 540; *Walsh v. Hartford Ins. Co.*, 73 N. Y. 10; *Bickford v. Menier*, 107 N. Y. 490; *Dunn v. Hornbeck*, 72 N. Y. 88; *Dickinson v. Salmon*, 36 Misc. Rep. 169.) The evidence introduced or offered by appellants was insufficient to require the court to submit for the consideration of the jury the question as to whether the plaintiff by any act ratified Barkin's acts. (*Hamlin v. Sears*, 82 N. Y. 327; *Condit v. Baldwin*, 21 N. Y. 219; *Ramsay v. Miller*, 202 N. Y. 75; *Thompson v. Craig*, 16 Abb. Pr. [N. S.] 29; *Woodruff v. Rochester R. R. Co.*, 108 N. Y. 39; *Berry v. Broadway Co.*, 148 App. Div. 159.) There was no evidence of any kind to justify an inference that Barkin's acts were ratified by silence or acquiescence. (*Hopkins v. Clark*, 7 App. Div. 207; 158 N. Y. 299; *Merritt v. Bissel*, 155 N. Y. 396; *Thomas v. Gage*, 141 N. Y. 506; *Viele v. McLean*, 200 N. Y. 260; *Lockwood v. Thorne*, 18 N. Y. 285.)

CARDOZO, J. The plaintiff appointed the defendants its renting agents for an apartment house known as the Chesterfield in the city of New York. At the close of the agency, a balance of rent was in the defendants' hands. For this the plaintiff sues. The defendants have proved an agreement by which the rent was to be held as

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security for a loan. The question is whether the plaintiff's agents were authorized to make the pledge.

In January, 1912, the Barkin Construction Company was the owner of the Chesterfield apartments. It was unable to pay the interest then due upon the mortgage. The interest amounted to \$11,250. There was need of \$5,000 to make the payment. One Samuel Barkin told the defendants that they would be made the agents of the building if they would loan \$5,000 to the company. Their appointment as agents was put in written form. It was signed in behalf of the company by Berman, the secretary. At the same time the defendants tendered Barkin a check for \$5,000 to the order of the Barkin Construction Company. Barkin asked them to substitute a check to his own order. He told them he was in fact the company. He also told them that the rents which they collected would be collateral security for the loan, and that if the note was not paid, they could reimburse themselves from their collections. All this was in the presence of Berman, the secretary. Berman made no protest. On the contrary, he signed the contract by which the defendants became agents. Thus re-assured the defendants substituted a check to Barkin's order and were given Barkin's note.

At the moment of this transaction Barkin was not in fact an officer of the plaintiff. He had been its president for many years, and as such had done business with the defendants. In 1910 he resigned in favor of his wife. But the loss of office did not dim his interest in the enterprise. He still assumed, whether with or without authority, to speak in its behalf. He put the defendants' money in his own bank account, but he did not keep it for himself. He drew his check for \$11,250 to the order of the company, and the company used the money to pay the interest on the mortgage. The state of the account would have made the payment impossible without the aid of the defendants' loan.

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In these transactions we hear nothing from Barkin's wife. The preservation of the plaintiff's property was at stake, but the crisis found her silent. She held six shares of the total issue of ten. Her brother-in-law and Berman held the rest. In name at least she was the president; but the management was in other hands. She was asked on the trial to whom she left her business arrangements. Her answer was that she left them to the secretary. The answer is verified by the course of dealing. It was the secretary, acting with Barkin, who employed the defendants. It was the secretary, acting with Barkin, who borrowed the money for the interest. Everything that followed confirms the inference of his authority. Barkin's note, as it fell due, was renewed from time to time. The secretary arranged for the renewal. On one occasion the defendants refused to turn over the rent unless the note was reduced. They reminded the secretary, Berman, that this was the agreement. He gave no sign of dissent, but undertook to procure from Barkin a payment of \$1,000, which was made the next day. The rents were deposited sometimes in the plaintiff's bank account and sometimes in Barkin's. The secretary determined where the deposit should be made. The defendants' statements of account, submitted from time to time, showed charges for interest on the loan. These statements reached the hands of Mrs. Barkin, who says she examined them. They were examined also by the secretary. The evidence justifies the inference that the accounts were retained without objection. During the entire course of the agency the defendants never had any dealings with any one except Barkin and Berman. Mrs. Barkin they never saw. At the close of the agency their note had been reduced to \$3,500. Barkin was then insolvent. He does not dispute the agreement that the rents as collected were to be security for the loan. Berman does not dispute it. The corporation for which they assumed to speak repudiates their

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authority. It had the benefit of the loan. It rejects the promise of security. In this position it has thus far been sustained. The trial judge held the agreement of no effect, and directed a verdict for the plaintiff. We think the judgment cannot stand.

The evidence justifies a finding that the loan, though made in form to Barkin, was for the benefit of the company. The situation was, therefore, one where property of the company could lawfully be pledged as security. Barkin and Berman, acting in concert, undertook to make the pledge. Enough was proved to permit a jury to say that the pledge was within the scope of Berman's powers. He was the company's secretary, but he was much more than its recording officer. The evidence makes it plain that he had been intrusted with the general management. In such circumstances the name with which his office was labeled is of small moment. The inference of authority is to be drawn from the things he was allowed to do (*First Nat. Bank of Providence v. Navassa Phosphate Co.*, 119 N. Y. 256; *Martin v. Niagara F. P. Mfg. Co.*, 122 N. Y. 165, 175; *Martin v. Webb*, 110 U. S. 7). Courts are not to shut their eyes to the realities of business life. Here was a small corporation controlled by a single family. Its business was run without formality (*Hall v. Hertzer Bros.*, 83 Hun, 19; 90 Hun, 280; 157 N. Y. 694). None the less it was run, and responsibility must be centred somewhere. In the daily conduct of its affairs there was no one except the secretary who assumed to speak for it. If he was not the manager, the company had none. We think the case was for the jury.

The judgment should be reversed and a new trial granted with costs to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN and ANDREWS, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

GATELY-HAIRE COMPANY (INCORPORATED), Respondent, *v.*
NIAGARA FIRE INSURANCE COMPANY OF THE CITY OF
NEW YORK, Appellant.

Insurance (fire) — cancellation of policy — when notice of cancellation of fire insurance policy given by insured and received by insurer effective, although insurer took no action with reference thereto until after loss by fire — construction and application of section 122 of Insurance Law (Cons. Laws, ch. 28) relating to cancellation of policies of fire insurance.

Where notice of cancellation of a fire insurance policy is received by an insurer from an assured prior to a loss thereunder, the policy is *ipso facto* terminated. A surrender of the policy by the assured, or return of unearned premium by the insurer, is not a condition precedent to a termination of the policy contract. *Held*, the notice of cancellation in this case complied with the requirements of the Insurance Law, section 122; hence the policy was not in force at the time of the loss. (*Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608, 614; *Boutwell v. Globe & Rutgers Fire Ins. Co.*, 193 N. Y. 323, followed. *Buckley v. Citizens Insurance Co. of Mo.*, 188 N. Y. 394, 404, explained.)

Gately-Haire Co. v. Niagara Fire Ins. Co., 176 App. Div. 921, reversed.

(Argued April 17, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 5, 1917, modifying and affirming as modified a judgment in favor of plaintiff entered upon an order of Special Term granting a motion by plaintiff for judgment in its favor upon the pleadings.

The nature of the action and the facts, so far as material, are stated in the opinion.

Ralph W. Gwinn for appellant. Nothing but the "request" of the insured communicated to the insurer is required to cancel immediately any fire insurance policy. (*Boutwell v. G. & R. F. Ins. Co.*, 193 N. Y. 323; *C. P.*

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Iron Co. v. A. Ins. Co., 127 N. Y. 608.) The mere "request" cancels the insurance without and irrespective of any other act by the insured or the insurer. (*Newark Fire Ins. Co. v. Simmons*, 11 Ill. App. 239; *Webb v. Granite State Fire Ins. Co.*, 164 Mich. 139; *Colby v. Cedar Rapids Ins. Co.*, 66 Iowa, 577; *Skillings v. Royal Ins. Co.*, 6 Ont. L. Rep. 401; *Parsons v. North Western Ins. Co.*, 133 Iowa, 532; *Davidson v. German Ins. Co.*, 74 N. J. L. 487; *El Paso Co. v. Hartford Fire Ins. Co.*, 121 Fed. Rep. 937; *Hillock v. Traders Ins. Co.*, 54 Mich. 531.)

Franklin M. Danaher for respondent. The letters of the insured to the respective companies of date of January 18, 1916, did not in either case request the cancellation of the policies in suit. (*Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417; *Richards on Ins.* [3d ed.] 384; *Boutwell v. G. & R. Ins. Co.*, 193 N. Y. 326; *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465; *Partridge v. M. M. Ins. Co.*, 13 App. Div. 519; 162 N. Y. 597; *Smith Lumber Co. v. Colonial Assur. Co.*, 172 App. Div. 149; 3 *Cooley on Ins.* 2793.) If the letters of January 18, 1916, can be construed to contain a request to cancel the policies, that request was coupled with a condition that the companies give the matter their immediate attention. Their neglect to pay or tender the unearned premium and to demand or accept a surrender of the policies before the fire estops them from claiming, after the fire, a cancellation thereof before the fire. (*Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465; *C. P. I. Ins. Co. v. A. E. Ins. Co.*, 127 N. Y. 618; *Hickey v. H. F. Ins. Co.*, 15 App. Div. 224.) It is admitted that the policies were never returned nor surrendered for cancellation nor tendered nor demanded for that purpose and that the unearned premiums were never demanded, paid or tendered, and that the policies were in the possession of the insured at the time of the fire, hence there was no valid cancella-

tion in any event of the policies by plaintiff's letters of January 18, 1916. (3 Cooley on Ins. 2804, 2805; *Buckley v. C. Ins. Co.*, 188 N. Y. 399; *Tisdell v. N. H. F. Ins. Co.*, 155 N. Y. 163; *C. P. I. Works v. A. E. Ins. Co.*, 127 N. Y. 608; *Train v. H. P. Ins. Co.*, 62 N. Y. 598; *Boutwell v. G. & R. F. Ins. Co.*, 193 N. Y. 323; *Birnstein v. S. F. Ins. Co.*, 83 App. Div. 436; *Hickey v. H. F. Ins. Co.*, 15 App. Div. 224; *G. H. Co. v. L., L. & G. Ins. Co.*, 122 App. Div. 155; *Hancock v. H. F. Ins. Co.*, 81 Misc. Rep. 160.) The policies were not validly canceled at the time of the fire and were outstanding obligations of the defendant insurance companies because the companies did not before the fire either return or pay or tender to the insured the unearned premiums, and the same had not been waived by the voluntary surrender of the policies. (*Buckley v. C. Ins. Co.*, 188 N. Y. 399; *Tisdell v. N. H. F. Ins. Co.*, 155 N. Y. 163; *Hickey v. H. F. Ins. Co.*, 15 App. Div. 224.)

HOGAN, J. The complaint in this action alleged that by a certain policy of insurance, dated May 5th, 1915, the defendant in consideration of a premium to it paid by the copartnership of Fitch & Hahn, insured said firm against loss or damage by fire on enumerated personal property for the period of one year. In July, 1915, the plaintiff having purchased from Fitch & Hahn the insured property, the policy of insurance, with the consent of the defendant, was assigned and transferred to the plaintiff. On January 27th, 1916, the property described in the policy was damaged and in part destroyed by fire. Plaintiff thereafter duly served on defendant verified proof of loss with a demand for payment of the amount claimed by reason of the loss. Defendant refused to recognize a liability under the policy. The answer served by defendant admitted the foregoing facts.

A further allegation of the complaint that the policy was in force at the time of the loss was denied in the

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answer. As an affirmative defense defendant alleged that under a provision of the policy which was set forth at length in the answer, defendant was required to cancel the contract when requested so to do by the assured; that on January 18th, 1916, nine days prior to the loss, the plaintiff made such request by a notice in writing addressed to defendant which was received by defendant the same day, which reads:

“GATELY-HAIRE Co., INC.,
“108 State Street,
“Albany, N. Y.

“Jan. 18, 1916.

“Messrs. VAN ALLEN & HAMILTON,
“8 Twedde Building,
“Albany, N. Y.:

“GENTLEMEN.—On taking our inventory we find we are carrying more insurance than is necessary. We wish to cancel policy No. 15,997 with the Niagara Fire Insurance Co. of the City of New York for \$3,000. This cancellation to take effect at once.

“Please give this matter your immediate attention and oblige,

“Yours very truly,

“GATELY-HAIRE CO., INC.,
“Per J. L. GATELY, Pres.”

Each party moved for judgment on the pleadings. The application of defendant was denied. Judgment for the relief demanded in the complaint was granted to plaintiff.

Upon appeal therefrom a slight modification was made by the Appellate Division, and as so modified the judgment was affirmed. Defendant appeals to this court.

The question presented by the pleadings is one of law, viz.: Was the policy of insurance in force on January 27th, 1916, the day when the loss occurred? The opinion of the justice at Special Term tersely stated the claims

made by counsel for both parties, and evidently determined that the failure of plaintiff to surrender the policy with the notice of cancellation or prior to the loss, continued the contract of insurance in force. I have reached a contrary conclusion.

Section 122 of the Insurance Law (Cons. Laws, chap. 28; formerly section 3, chapter 110, Laws of 1880) was enacted for the protection of an assured and conferred upon the assured the sole right to cancel a policy of fire insurance. It reads as follows:

“Any corporation, person, company or association transacting the business of fire insurance in this state shall cancel any policy of insurance upon the request of the insured or his legal representatives, and shall return to him or to such representative the amount of premium paid, less the customary short rate premium for the expired time of the full term for which the policy has been issued or renewed, notwithstanding anything in the policy to the contrary. * * *”

Counsel for respondent argued that the letter of January 18th, addressed by plaintiff to defendant, was not a request to cancel the policy within the meaning of the Insurance Law for the reason that the statute requires a request thereunder to be couched in terms positive and unequivocal; that plaintiff merely expressed a “wish” to cancel the policy rather than a “request” that same be canceled, hence plaintiff failed to exercise the privilege secured to it to cancel the policy. The attempted distinction between the expressions “wish” and “request” is unwarranted. A casual reading of the communication discloses the unmistakable intention of the plaintiff. It was carrying more insurance than its inventory warranted. It expressed a desire to have the policy issued by defendant canceled, not at a future day or upon any condition but “at once” and the urgency of the demand made was emphasized by a request that defendant give “immediate attention” to the same. I conclude that the

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notice of cancellation fully complied with the requirement of the statute. Counsel contends that even assuming the notice of cancellation was sufficient in form, nevertheless it was ineffective to terminate the contract because the defendant did not give "immediate attention" to a cancellation of the policy as requested or take steps to cancel the policy. That argument proceeds upon the assumption that subsequent to a notice of cancellation received by an insurer from an assured some affirmative act on the part of the insurer is necessary to terminate the contract. The answer to the suggestion is two-fold, *first*, the statute which has been in force for a long period of time does not so provide but on the contrary authorizes an assured to cancel the policy at any time upon making request for cancellation and requires the insurer to cancel upon receipt of such request; *second*, the construction placed upon the statute by the decisions of this court is to the contrary. (*Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608, 614; *Boutwell v. Globe & Rutgers Fire Ins. Co.*, 193 N. Y. 323.) In the *Crown Point* case, as stated in the opinion, the question presented was "Was the policy in force when the fire occurred?" the identical question presented here. Judge VANN writing for the court in that case quoted the substance of the statute and then interpreted the same in the following language: "The command of the statute is clear and no discretion or option is left to the company. The sole requirement to set the command in motion is a request by the insured, and after that request is made, the further continuance of the contract would be in contravention of the statute." The opinion also referred to the clause of the policy there under review which contained a provision in the language of the policy here considered that the "insurance may be terminated at any time at the request of the assured," and the opinion then continued: "While the method of terminating the insurance upon the motion of the insured is not specified, except that the insured party

is to request it, the language of the contract indicates that the subject is within his control and that the terminating act is to be done by him alone, without any concurrent or supplemental act on the part of the company." The statute as thus construed was approved in the opinion in the *Boutwell* case and must be held controlling in the case at bar upon the parties to this action.

I pass to the suggestion that the policy was in force notwithstanding the request of plaintiff that the same be canceled by reason of a failure of plaintiff to surrender the policy and the omission of defendant to tender or pay the unearned premium thereon. The clause in the policy set out in the answer provides for a cancellation by the company as well as by the assured. It reads:

"This policy shall be cancelled at any time at the request of the insured; or by the company, by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium."

As bearing upon the privilege of the assured to cancel the policy it is essential that the statute and the provision of the policy be read together. The statute peremptorily requires a cancellation upon the request of the assured "notwithstanding anything in the policy to the contrary." The policy is the standard form policy adopted pursuant to legislative authority intended to make effective the requirements of the statute which had been in force since 1880. To adopt the argument of counsel would require this court to read into the statute and the policy approved by law conditions precedent to a cancellation of the policy by an assured which the legislature in

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numerous codifications of the statute has omitted to impose. I cannot assent to such proposition.

The policy provides: "This policy shall be cancelled at any time at the request of the insured; if this policy shall be cancelled as hereinbefore provided (at the request of the insured), the premium having been actually paid, *the unearned premium shall be returned on surrender of the policy or last renewal.*" Under the statute and language of the policy upon receipt by defendant of the notice of cancellation by plaintiff, the contract was *ipso facto* terminated and "a further continuance of the contract would be in contravention of the statute." The contract terminated. The premium having been paid thereon, the policy prepared by legislative direction (Section 121, Insurance Law) provides how and when the unearned premium shall be paid, viz., "on surrender of the policy or last renewal." It does not provide for a surrender of the policy or refund of unearned premium as condition precedent to effect a cancellation, but recognizes the absolute right of the assured to cancel a policy at any time, and having exercised such right that the assured becomes a creditor of the company for the amount of unearned premium as of the date of cancellation, payable upon surrender of the policy or last renewal.

Certain decisions relied upon by counsel necessitate reference to the clause of the policy relating to the right of an insurer to cancel the same. The provision is: This policy shall be canceled at any time by the company by giving five days' notice of such cancellation, if this policy shall be cancelled as hereinbefore provided (by giving notice) the premium having been actually paid, it (the company) shall retain only the *pro rata* premium.

In *Nitsch v. American Central Ins. Co.* (affirmed without opinion, 83 Hun, 614; 152 N. Y. 635) the trial justice held that under a like provision in a policy an insurer could not make the notice of cancellation effective and at the same time retain the whole premium, that

the notice of cancellation by the company could only be effective by an actual tender of the unearned premium. That decision was followed in *Tisdell v. New Hampshire Fire Ins. Co.* (155 N. Y. 163), and while determining the right of a company to terminate a policy has no application to the right of an assured to cancel the contract.

The case of *Buckley v. Citizens Insurance Co. of Mo.* (188 N. Y. 399, 404), cited in the opinion at Special Term and statements contained in the opinions in the *Crown Point* and *Boutwell* cases it is said by counsel are decisive of the right of plaintiff to recover in this action.

An examination of the opinions in the cases cited when interpreted with regard to the subject-matter under consideration by the court demonstrates the fallacy of that argument. In the *Buckley* case the policy was terminated by the company, not by the assured. Accompanying the notice of cancellation the company requested a return of the policy. Buckley returned the policy and thereafter a loss occurred. The unearned premium not having been paid by the company, Buckley asserted that the policy was in force, brought action thereon and recovered judgment. This court reversed the judgment on the ground that the voluntary and unconditional surrender of the policy was as matter of law a waiver of his right to treat the policy as in force until the company paid or tendered to him the unearned premium, distinguishing the cases of *Nitsch v. American Cen. Ins. Co.* and *Tisdell v. N. H. F. Ins. Co.* Notwithstanding the fact that the reversal of the judgment proceeded upon the sole ground of waiver; that the question of the right of the assured to cancel a policy of insurance under the Insurance Law on the policy was not presented upon the appeal before the court, the opinion continued: "It is a question of vital importance to the insurer and the insured as to the precise meaning of the cancellation clause in the *standard policy*. The situation is not a complicated one and the court desires to so construe the clause that its

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meaning may be made clear. If the insurance company desires to cancel it must, as we have held in the cases cited, not only give the notice required, but accompany it by the payment or tender of the *pro rata* amount of the unearned premium; it cannot legally demand of the insured the surrender of the policy and its cancellation until this is done. If, on the other hand, the insured desires to terminate the contract, he must give the notice of cancellation, allow the company to retain the customary short rate of unearned premium and surrender the policy. If the company fail, on demand, to pay the balance of the premium due he can sue and recover the same."

Counsel for plaintiff interprets the decision of the *Buckley* case as a determination that a surrender of a policy is necessary to effectuate a cancellation of the same. Reference is not made in the opinion to the provisions of the Insurance Law that an insurer shall upon request of the assured cancel a policy, nor to the construction placed upon the same by this court sixteen years before the decision of the *Buckley* case in the *Crown Point Co.* case, where it was held that the request of an assured for a cancellation upon receipt of same by the insurer *ipso facto* terminated the contract. When occasion demands that a decision solemnly made by this court cannot longer be considered as controlling it is the universal practice not only to indicate that fact in unmistakable language but to point out the reasons why such conclusion has been reached. Had this court intended to adopt a rule of construction adverse to the one so clearly defined in the *Crown Point Co.* case, precise language to that effect would be found in the opinion. That it was not intended to overrule the earlier construction is evidenced by the fact that in the *Boutwell Case* (193 N. Y. 323), decided eighteen months after the decision of the *Buckley* case, this court in an unanimous opinion referred to the decision of the *Crown Point Co.* case, quoted at length from the opinion therein upon the interpretation

of the Insurance Law and reiterated the principle that the receipt by an insurer of an unconditional request for cancellation *ipso facto* cancels the contract. The opinion in the *Buckley* case does not change or weaken the construction of the statute as determined in the *Crown Point Co.* case, reaffirmed in the *Boutwell* case. The judge writing in the *Buckley* case in speaking of the unearned premium and surrender of the policy referred to the rights of the parties *subsequent* to the cancellation of the policy. Thus the opinion states, "he [the assured] must * * * allow the company to retain the customary short rate of unearned premium," that is, the premium which would have been payable had the policy been originally written for the time in which it actually remained in force. If the policy in question was not *ipso facto* canceled upon request of the assured, the company was powerless to change the rate of premium and retain the customary short rate, likewise the assured could not demand the balance of the premium, or maintain an action to recover the same if the contract was still in force. The contract terminated by the request, the company was then required by the policy to compute the amount of premium due the assured after such cancellation, for which amount it became a debtor to the assured. Such indebtedness was payable on surrender of the policy. In the event of the failure on the part of the company to pay the same, the assured was then at liberty to "sue and recover the same."

The principle established in the *Crown Point Co.* case, approved in the *Boutwell* case, has been adopted and followed in numerous cases in other jurisdictions (*Webb v. Granite S. F. Ins. Co.*, 164 Mich. 139; *Hillock v. Traders Ins. Co.*, 54 Mich. 531, 539; *Colby v. C. R. Ins. Co.*, 66 Iowa, 577; *Parsons v. N. W. Nat. Ins. Co.*, 133 Iowa, 532; *Davidson v. German Ins. Co.*, 74 N. J. L. 487; *El Paso R. Co. v. Hartford F. Ins. Co.*, 121 Fed. Rep. 937; *Skillings v. Royal Ins. Co.*, 6 Ont. L. Rep. 401) and is still the law in this state.

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In the *Crown Point Co.* case six several actions against six several insurance companies were tried before a referee who reported in favor of the plaintiff in each action. The judgments entered thereon were reversed by the General Term. On appeal to this court the order of the General Term in the action against the *Aetna Company* was affirmed; in each of the remaining actions the decision of the General Term was reversed and the judgments entered upon the report of the referee affirmed.

In each case the companies interposed as an affirmative defense that prior to the fire the plaintiff had surrendered the several policies for cancellation and terminated the insurance. The court held that the policy of the *Aetna Company*, with notice of cancellation, had been received prior to the time of the loss, but that as to the other companies the policies and notice of cancellation were not received until subsequent to the loss.

All that was written in the *Crown Point Co.* case upon the question of surrender of a policy had reference to the facts appearing in that case where there had been a voluntary surrender of the policy by the assured accompanying the request for cancellation.

In the *Boutwell* case, to which reference has been made, a binding slip had been issued but no premium paid thereon or on the policy subsequent to the loss. In an action upon the policy, judgment was rendered for defendant, which was affirmed by the Appellate Division but reversed by this court for the reason that the request for cancellation as made carried with it and as a part of it the abandonment by the defendant company of any claim for insurance premiums, and the court held, "To avoid an assent to the conditional proposition it was necessary for the agents to reject it wholly. The rejection of the proposition left the binding slip and the policy issued thereon unaffected and at full force at the time the loss occurred." (p. 327.)

Additional decisions cited by counsel for plaintiff,

respondent, have been examined and considered. To distinguish each case and excerpts quoted by counsel from the same would extend this already voluminous opinion at too great length.

The judgments of the Appellate Division and Special Term should be reversed, and the complaint dismissed, with costs to appellant in all courts.

McLAUGHLIN, J. (concurring). The plaintiff, nine days before the fire occurred, requested the defendant to cancel the policy. The request was in writing, as follows: "On taking our inventory we find we are carrying more insurance than is necessary. We wish to cancel policy No. 15,997, with the Niagara Fire Insurance Co. of the City of New York for \$3,000. This cancellation to take effect at once." After issue had been joined in the action by the service of the answer each party moved, under section 547 of the Code of Civil Procedure, for judgment on the pleadings. The defendant's motion was denied and the plaintiff's granted, and from a judgment entered in favor of the plaintiff for the relief demanded in the complaint an appeal was taken to the Appellate Division, where the judgment was affirmed, and from such affirmance the present appeal is taken.

The sole question presented by the appeal is whether, under the terms of the policy and section 122 of the Insurance Law (Cons. Laws. chap. 28), a request by the insured to have a policy of fire insurance canceled is sufficient to accomplish that purpose without a surrender of the policy. The learned justice sitting at Special Term was of the opinion that the policy having been retained by the plaintiff remained in full force at the time of the fire, notwithstanding the request made prior thereto to cancel, and this was the view entertained by the Appellate Division.

I have been unable to reach such conclusion. To do so necessitates, as it seems to me, not only an utter dis-

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regard of the terms of the policy, but also, in effect, a repeal of the statute relating to cancellation. This provision of the policy is: "This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium." And the statute (Laws of 1892, chap. 690, § 122) reads: "Any corporation, person, company or association transacting the business of fire insurance in this state shall cancel any policy of insurance upon the request of the insured * * * and shall return to him * * * the amount of premium paid, less the customary short rate premium for the expired time of the full term for which the policy has been issued or renewed, notwithstanding anything in the policy to the contrary. * * *."

The request which the insured made to have the policy canceled was so clear and explicit that it could not possibly be misunderstood: "We wish to cancel policy No. 15,997 * * *. This cancellation to take effect at once." What other words could have been used which would have better expressed an intent that the contract be at once terminated? Obviously the insured, by reason of the over-insurance, wanted the contract immediately terminated so that it could get back the unearned premium. The intent to cancel was so expressed it could not by any possibility be misunderstood and when received by the insurance company, that moment the policy, *ipso facto*, became canceled. (*Boutwell v. Globe & Rutgers Fire Ins. Co.*, 193 N. Y. 323.) There was nothing for the company to do because it had no option in the matter. No formal cancellation or physical defacement

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of the policy was required, since by the terms of the contract and the statute the request, when received, effected a cancellation. This was clearly pointed out in *Crown Point Iron Co. v. Aetna Insurance Co.* (127 N. Y. 608, 614) where the court, speaking through Judge VANN, said: "The command of the statute is clear, and no discretion or option is left to the company. The sole requirement to set the command in motion is a request by the insured, and after that request is made, the further continuance of the contract would be in contravention of the statute * * *."

To the same effect are decisions in other jurisdictions. Thus, in *Webb v. Granite State Fire Ins. Co.* (164 Mich. 139) the court said: "We have no hesitation in holding that the cancellation is complete when the notice provided for by the contract is given and that thereafter the relation of the parties is changed from that of insurer and insured to that of debtor and creditor." In *Parsons v. North Western Nat. Ins. Co.* (133 Iowa, 532): "The insured having so requested, cancellation necessarily followed." In *Skillings v. Royal Ins. Co.* (6 Ont. L. Rep. 401): "The insurance may be terminated by giving written notice to that effect * * *. There is no direction * * * but a written notice must be given to the company or its authorized agent and the giving of that written notice is what constitutes the cancellation."

The policy is only evidence of the contract and its termination in no way depends upon the surrender or destruction of such evidence. (*Hillock v. Traders Ins. Co.*, 54 Mich. 531.) The one thing necessary to effect a cancellation is a request made by the insured and received by the insurer. (*Davidson v. German Ins. Co.*, 74 N. J. L. 487; *Colby v. Cedar Rapids Ins. Co.*, 66 Iowa, 577; *El Paso R. Co. v. Hartford Fire Ins. Co.*, 121 Fed. Rep. 937.)

But the citation of authorities seems unnecessary in view of the explicit language of the policy itself. In the

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paragraph quoted it will be observed that the first sentence provides for a complete scheme for cancellation either by the insured or the insurer—"This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation." If nothing further appeared in the paragraph, no one, I take it, would seriously contend it was necessary, in order to effect a cancellation, that the policy should be returned. But what follows in the paragraph is another sentence and deals not with cancellation, but only with the rights of the parties *after cancellation has taken place*. Observe the words: "If this policy shall be cancelled as hereinbefore provided * * * the premium having been actually paid, the unearned portion shall be returned on surrender of this policy. * * *." If the return of the policy be a necessary prerequisite to cancellation, then the last sentence is not only contradictory of the first, but the last five words in the last sentence are meaningless. But they are not. The notice to cancel having been given by the insured and received by the insurer cancellation is complete, and the unearned premium must then be returned upon surrender of the policy. The request of the insured automatically effects a cancellation, as do many other acts of the insured under the terms of the policy, *e. g.*, the procuring of other insurance, increasing the risk, mortgaging the property, or change of interest other than that occasioned by death.

But it is suggested that this court in *Nitsch v. American Central Ins. Co.* (152 N. Y. 635), *Tisdell v. New Hampshire Fire Ins. Co.* (155 N. Y. 163), and *Buckley v. Citizens Ins. Co. of Mo.* (188 N. Y. 399), held that a surrender of the policy was necessary in order to effect a cancellation. The answer to the suggestion is that in each of those cases attempts were made by the insurance company to cancel. The right of the insured to effect a cancellation was not involved. It is true there are expressions in the opinions, or some of them, which indicate that a cancellation is not

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complete until the policy has been returned, but such expressions were only used by way of argument, and have no effect upon the decision or determination of the question here under consideration. As was said in *Colonial City T. Co. v. Kingston City Railroad Co.* (154 N. Y. 493, 495): "It was not our intention to decide any case but the one before us. * * * If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the question presented, they are the dicta of the writer of the opinion and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance."

The foregoing view that the surrender of a policy, where the insured desires a cancellation, is unnecessary, is sustained to some extent, at least, by the following authorities: *Walthear v. Pennsylvania Fire Ins. Co.* (2 App. Div. 328); *Backus v. Exchange Fire Ins. Co.* (26 App. Div. 91); *Schwarzchild & Sulsberger Co. v. Phoenix Ins. Co. of Hartford* (115 Fed. Rep. 653; Id. 124 Fed. Rep. 52); *Mangrum v. Law Union & Rock Ins. Co.* (L. R. A. 1916 F. p. 440 and note); *Straker v. Phenix Ins. Co.* (101 Wis. 413); *Phoenix Mutual Fire Ins. Co. v. Brecheisen* (50 Ohio St. 542).

I, therefore, concur in the opinion of Judge HOGAN that the judgments of the Appellate Division and Special Term should be reversed and judgment directed for the defendant dismissing the complaint, with costs in all courts.

HISCOCK, Ch. J., CHASE, POUND, CRANE and ANDREWS, JJ., concur with HOGAN, J.; McLAUGHLIN, J., reads concurring opinion.

Judgments reversed, etc.

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In the Matter of the Claim of MARY V. SAXON, Respondent, against ERIE RAILROAD COMPANY, Appellant.

STATE INDUSTRIAL COMMISSION, Respondent.

Workmen's Compensation Law — state industrial commission must pass upon nature of employment of injured employee if it is contended and shown by any evidence that he was employed in interstate, instead of intrastate, commerce.

In view of the restrictions placed by the United States Supreme Court (*N. Y. C. & H. R. R. Co. v. Winfield*, 244 U. S. 147, reversing same case, 216 N. Y. 284) upon the application of the Workmen's Compensation Law (L. 1914, ch. 41), to the effect that compensation cannot be awarded under that act for injuries received in the course of interstate commerce, it is necessary that the commission should pass upon the nature of the employment of an injured employee, where, as in this case, the contention is seriously made and supported by evidence that the employment at the time of the injury was in the course of interstate commerce.

Matter of Saxon v. Erie R. R. Co., 172 App. Div. 918, reversed.

(Submitted October 11, 1916; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 4, 1916, affirming an award of the state industrial commission under the Workmen's Compensation Law.

The facts, so far as material, are stated in the opinion.

Thomas Watts, Elbert N. Oakes and John Bright for appellant. The deceased was engaged in interstate commerce at the time of the accident. (*Pederson v. D., L. & W. R. R. Co.*, 229 U. S. 146; *Eng v. Southern Pacific R. R. Co.*, 210 Fed. Rep. 92; *Law v. Illinois Central Railroad Co.*, 208 Fed. Rep. 869; *Walsh v. N. Y., N. H. & H. R. R. Co.*, 223 U. S. 5, 6; *Central Railway Co. v. Colasurdo*, 192 Fed. Rep. 901; *Dorr v. Baltimore & Ohio*

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R. R. Co., 197 Fed. Rep. 665; *Barlow v. Lehigh Valley R. R. Co.*, 214 N. Y. 116.) The Federal Employers' Liability Act is exclusive, and claimant's right to recover is measured by it alone. (*M. C. R. R. Co. v. Vreeland*, 227 U. S. 59; *St. Louis, I. Mt. & S. Ry. Co. v. Hesterly*, 228 U. S. 702; *St. L. Ry. v. Scale*, 229 U. S. 156; *N. C. R. R. Co. v. Zachary*, 232 U. S. 248; *Wabash R. R. Co. v. Hayes*, 234 U. S. 86; *People v. N. Y. C. & H. R. R. Co.*, 163 App. Div. 79; *Gee v. Lehigh Valley R. R. Co.*, 163 App. Div. 274; *Charleston & C. R. R. v. Varnville Co.*, 237 U. S. 597; *Matter of Parsons v. D. & H. Co.*, 167 App. Div. 536.) The Federal Employers' Liability Act is exclusive, irrespective as to whether the employer was or was not negligent. (*Staley v. Illinois Central R. R. Co.*, 109 N. E. Rep. 342.)

Egburt E. Woodbury, Attorney-General (E. C. Aiken of counsel), for respondent. The deceased employee was not engaged in interstate commerce at the time he received the injuries which resulted in his death. (*I. C. R. R. Co. v. Behrens*, 233 U. S. 476; *Shanks v. D., L. & W. R. R. Co.*, 214 N. Y. 416.)

HISCOCK, Ch. J. The findings disclose that at the time of the death of claimant's husband he was in the employ of the Erie Railroad Company, which was engaged in moving both interstate and intrastate commerce. The deceased was a machinist's helper and on the day in question had been assigned to help in making light repairs on certain engines. As he was proceeding from a spot where he had been waiting to the place where he was to engage in making these repairs he was run over by an engine and killed. The findings do not state generally whether the intestate at the time of his death was engaged in performing services which were connected with and a part of interstate commerce or whether they were connected with and a part of intrastate commerce;

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they do not state even controlling evidentiary facts from which the conclusion of law might be drawn that he was engaged in one rather than the other kind of employment.

The inquiry arises whether with this omission the findings are sufficient to sustain the award, that being the only question which can be argued by appellant in view of the unanimous affirmation. We do not think they are.

The only controversy on the hearing was the one concerning the nature of the employment of claimant's husband when killed. The appellant produced a large amount of evidence in the form of uncontradicted affidavits to show that his employment was to be regarded as connected with and a part of interstate business. Assuming that the determination of this claim was governed by the rule stated in the Compensation Act (L. 1914, ch. 41), that a claim is presumed to come within the provisions of the act in the absence of substantial evidence to the contrary (Section 21), a question was presented which lay at the very foundation of the claimant's right to recover. If the deceased was engaged in services pertaining to and a part of interstate commerce she was not entitled to recover. (*N. Y. C. & H. R. R. Co. v. Winfield*, 244 U. S. 147.)

The appellant not only by evidence but by motion to dismiss the claim and by request to find, pressed this proposition upon the attention of the commission, but, as stated, the latter entirely failed to pass upon it and to find either way. Of course it should be said that this does not indicate any intention on the part of the commission to avoid decision of a material issue. That tribunal had a perfect right at the time of the hearing to assume in view of the decision of this court in *Matter of Winfield v. N. Y. C. & H. R. R. Co.* (216 N. Y. 284) that it did not make any difference whether the deceased was engaged in one or the other form of employment. But

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now in view of the decision of the United States Supreme Court holding that compensation cannot be awarded under our statute for injuries received in the course of interstate commerce, it is apparent that the question was material and we must review the action of the commission in the light of the law as it has now been declared. Doing this we find that it has omitted to pass upon a decisive question which was presented to it by evidence and argument and the decision of which in favor of the appellant would have led to a dismissal of the claim. We think that such failure resulted in what was equivalent to a mistrial and necessitates a new hearing. (*Dougherty v. Lion Fire Ins. Co.*, 183 N. Y. 302, 306; *Morehouse v. Brooklyn Heights R. R. Co.*, 185 N. Y. 520.) As we have before pointed out, the application of liberal and simple rules of practice, such as should be applied to the hearing and determination of claims under the Workmen's Compensation Act, cannot be regarded as obviating the necessity of observing certain fundamental rules which are really essential to the administration of substantial justice between the parties. (*Matter of Bloomfield v. November*, 219 N. Y. 374.) In view of the restrictions placed by the United States Supreme Court upon the application of our statute we think that it is necessary that the commission should pass upon the nature of the employment of the injured employee where, as in this case, the contention is seriously made and supported by evidence that the employment at the time of the injury was in the course of interstate commerce.

The order of the Appellate Division and the award of the commission should be reversed and a new hearing granted, with costs to abide event.

CHASE, COLLIN, CUDDEBACK, HOGAN and CARDOZO, JJ., concur.

Order reversed, etc.

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UNION ESTATES COMPANY, Appellant, v. ADLON CONSTRUCTION COMPANY et al., Defendants, and FRAZEE REALTY COMPANY et al., Respondents.

Interest — in absence of an interdicting statute parties may agree that a rate of interest, exceeding the legal rate, shall be paid — agreement to pay interest at a certain rate before a loan is due and a greater rate thereafter is an agreement to pay interest not a penalty — agreement by a corporation to pay interest in excess of the legal rate is not usurious, and the guarantor of such contract is liable thereon.

1. In the absence of an interdicting statute, the lender and borrower may agree that a rate of interest, other than the rate fixed as the legal rate by a statute, shall be paid from the date to either the maturity or the payment of the loan.
2. An agreement to pay interest upon a loan from its date until its payment at a rate before and a different rate after its maturity is an agreement to pay interest and not a penalty as to the latter rate.
3. An agreement by a corporation to pay interest beyond the legal rate is not usurious (General Business Law [Cons. Laws, ch. 20], §§ 370, 371, 373, 374), and a guarantor of the contract is liable thereon within the obligations of his guaranty.

Union Estates Co. v. Adlon Construction Co., 165 App. Div. 979, reversed.

(Argued April 8, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 31, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Louis F. Levy and Joseph J. Corn for appellant. If the parties contract for a lawful rate of interest after as well as before maturity the contract or stipulated rate

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must govern, whether that be more or less than the legal or statutory rate. (*O'Brien v. Young*, 95 N. Y. 428; *Taylor v. Wing*, 84 N. Y. 471; *Zimmerman v. Klauber*, 139 App. Div. 26; *Patteson v. Graham*, 16 N. Y. S. R. 703; *Association, etc., v. Eagleson*, 60 How. Pr. 9; *Genet v. Kissam*, 21 J. & S. 43; *Ferris v. Hard*, 135 N. Y. 354; *Kelley v. Phenix Nat. Bank*, 17 App. Div. 498; *Daniel v. Gibson*, 72 Ga. 368.) In this state the lawful rate is the stipulated rate not exceeding six per cent except when the obligor is a corporation, and even when the obligor is an individual, where the loan is of a certain nature, and in these excepted cases the lawful rate is the stipulated rate whatever its amount. (General Business Law, §§ 370, 374, 379; *Curtis v. Leavitt*, 15 N. Y. 85; *Rosa v. Butterfield*, 33 N. Y. 665; *Stewart v. Bramhall*, 74 N. Y. 85; *Hawley v. Kountze*, 6 App. Div. 217; *Wright v. Toomey*, 137 App. Div. 401; 204 N. Y. 661.) The parties may at the inception of the loan agree as to an increased rate of interest from maturity to actual payment provided only the increased rate be lawful, *i. e.*, not usurious. (*Paine v. Caswell*, 68 Me. 80; *Eaton v. Boissonnault*, 67 Me. 540; *Capen v. Crowell*, 66 Me. 282; *Hubbard v. Callahan*, 42 Conn. 524; *Ex parte Ferber*, [L. R.] 17 Ch. Div. 191; *Florence v. Jennings*, 2 C. B. [N. S.] 454; *Burton v. Slatterly*, 5 Brown's P. C. 233; 2 Eng. Rep. Full Reprints, 638; *Miller v. Kempner*, 32 Ark. 573; *Portis v. Merrill*, 33 Ark. 416; *Finger v. McCaughey*, 114 Cal. 64; *Thompson v. Gorner*, 104 Cal. 168.) The supplemental agreement is not unconscionable. (*MacQuoid v. Queens Estates*, 143 App. Div. 134; *Portis v. Merrill*, 33 Ark. 416; *Parmelee v. Cameron*, 41 N. Y. 392; *Carley v. Tod*, 83 Hun, 69; *Earl v. Peck*, 64 N. Y. 596; *Worth v. Case*, 42 N. Y. 369; *Seymour v. Delaney*, 3 Cow. 452.) The Special Term erred in saying that as the increased interest was not charged as a consideration for a definite extension of the time of payment, it was intended merely to stimulate prompt payment and

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was, therefore, a penalty. (*Hubbard v. Callahan*, 42 Conn. 524; *Rogers v. Sample*, 33 Miss. 310.)

Outerbridge Horsey and Ellery O. Anderson for respondents. The collateral agreement of July 11, 1912, in so far as it provides for the payment of additional interest at the rate of seventeen per cent, in default of payment of principal and interest at the rate of six per cent upon October 8, 1912, is a contract for a penalty and unenforceable. (*Chaud v. Shepard*, 122 N. Y. 397; *Caesar v. Robinson*, 174 N. Y. 492.) An agreement to pay interest after maturity at an increased rate is a contract for a penalty against which equity will relieve. (*Domina Holles v. Wyse*, 2 Vern. 289; *Strode v. Parker*, 2 Vern. 316; *Nicholls v. Maynard*, 3 Atk. 519; *Orr v. Churchill*, 1 H. Bl. 227; *Thompson v. Hudson*, [L. R.] 4 H. L. 1; *Cook v. Fowler*, [L. R.] 7 H. L. 27; *Bagley v. Peddie*, 16 N. Y. 469.) The supplemental agreement does provide for the payment of a larger sum upon default in payment of a smaller sum. (*Sumner v. People*, 29 N. Y. 337.)

COLLIN, J. The ultimate question to be decided by us is, are the defendants, Frazee Realty Company, a domestic corporation, and Harry H. Frazee, liable to the plaintiff, by virtue of their written agreement with the plaintiff, for interest upon the sum secured by the bond and mortgage of the realty company at the rate of twenty-three per centum from the date of its maturity. Thus far it has been adjudged, and erroneously, that they were not. The instruments were executed as a single transaction July 11, 1912. The bond, fulfillment of which was secured by the mortgage, obligated the company to pay the plaintiff, on October 8, 1912, seventy thousand dollars with interest at the rate of six per centum per annum. By the written agreement the company "covenants and agrees that in the event that said mortgage shall not be

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paid on said 8th day of October, 1912, the party of the first part (the company) will in addition to interest at the rate of six per cent. per annum provided for in said mortgage, pay additional interest at the rate of seventeen per cent. per annum upon any sums remaining unpaid upon said bond and mortgage from October 8, 1912, until the day when said mortgage and its accompanying bond shall be fully and actually paid." The defendant Harry H. Frazee thereby guaranteed to the plaintiff the full and absolute performance by the company of all the terms, covenants and conditions undertaken by it in the bond and mortgage and in the written agreement. The company wholly defaulted in such performance. The agreement further provided: "Nothing herein contained shall be construed as obligating the party of the second part, its successors or assigns, to extend the payment of said mortgage beyond said October 8, 1912, or as limiting the right to foreclose or take any other steps whatsoever in connection with said bond and mortgage upon a default in any of the terms, covenants and conditions of said bond and mortgage for \$70,000." In this action to foreclose the mortgage, judgment of foreclosure and sale, awarding the plaintiff interest at the rate of six per cent per annum only, was entered April 15, 1914. Under the notice of appeal, the record and the briefs and arguments of counsel, we are to determine whether or not the company and Frazee were personally liable for the additional interest, from the maturity of the debt, at the rate of seventeen per centum.

Inasmuch as the company is a corporation, the undertaking of the written agreement was not void, as being usurious. (General Business Law [Cons. Laws, ch. 20], sections 370, 371, 373, 374.) Frazee was a guarantor of a lawful contract and, therefore, liable within the obligations of his guaranty. (*Rosa v. Butterfield*, 33 N. Y. 665.) In case the written agreement creates a penalty for failure to pay the debt at maturity, the judgments below are right. In case it creates the contractual obli-

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gation to pay interest in the additional sum, they are erroneous.

In the absence of an interdicting statute, the lender and borrower may agree that a rate of interest, other than the rate fixed as the legal rate by a statute, shall be paid from the date to either the maturity or the payment of the loan. The mere legislative naming of a rate does not bar a stipulation for a different rate, either less or greater. The lawfulness of such a stipulation does not depend upon the existence of a sanctioning statute, but upon the absence of a prohibiting statute. An agreement to pay interest upon a loan from its making until its payment, disregarding its maturity, is precisely what it purports to be, that is, an agreement to pay interest. (*O'Brien v. Young*, 95 N.Y. 428.) Likewise, an agreement to pay interest upon a loan from its date until its payment at a rate before and a differing rate after its maturity is an agreement to pay interest and not a penalty as to the latter rate. In *Herbert v. Salisbury & Yeovil Ry. Co.* (L. R. 2 Eq. Cas. 220) the defendant railway company agreed that the purchase money of lands of the plaintiff taken by it should be paid on or before the 1st of July, 1858; that interest thereon should be paid at the rate of four per cent, such interest to be calculated from the respective times of the company taking possession of each acre of the land; that from and after the 1st of July, 1858, the company should pay interest at five per cent upon the purchase money, should the same be not then paid, and from and after the 1st of January, 1859, should pay interest at eight per cent on all moneys remaining due under the agreement until payment thereof, but that this should not be considered as creating any right on the part of the company to withhold or delay the payment of such moneys upon paying such higher rate of interest. The interest began to run at different times between September, 1856, and May, 1857, and the purchase money was not paid until February, 1865. The delay was not

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caused by the willful default or negligence of the vendor. The railway company refused to pay interest at the increased rate, insisting that the stipulation therefor was intended as a penalty to secure the completion of the purchase within a reasonable time and hence unenforceable. Lord ROMILLY, writing for the court, said: "I am of opinion, however, that the stipulation in this contract for payment of interest at eight per cent is not in the nature of a penalty, but is a separate and distinct contract. It is not the high rate of interest which constitutes a penalty. I apprehend it is quite clear that if a vendor and a purchaser enter into a contract by which the purchaser agrees to pay ten per cent interest from the time that he takes possession until the contract is completed, in the absence of any fraud or misconduct of the vendor he is bound to pay interest at ten per cent. Having made that contract with his eyes open, he cannot afterwards complain that that rate of interest is very heavy, or say that, by reason of the interest being very heavy, it is in the nature of a penalty, which the Court of Chancery will relieve against. So also if the contract provides that the purchase-money shall be paid in the course of, or at the end of, ten years, and that the interest for the first two years shall be five per cent, and the interest for the next two years shall be seven per cent, and so on, that is a perfectly good contract. That is quite distinct from a stipulation that if the interest is not paid regularly the amount shall be increased. Here the parties thought fit to enter into this contract, that the rate of interest was to be four per cent up to a certain date, five per cent for the next half year, and eight per cent for every subsequent year. I know of nothing to prevent persons from entering into a contract of that description." We approve of the reasoning and conclusion thus expressed. Moreover, they have potent support in judicial decisions. (*Capen v. Crowell*, 66 Me. 282; *Kendall v. Equitable Life Assurance Soc.*, 171 Mass. 568; *Hubbard v. Callahan*, 42 Conn. 524; *Pass v. Shine*, 113

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N. C. 284; *National Life Ins. Co. v. Hale*, 154 Pac. Rep. 536; *Miller v. Kempner*, 32 Ark. 573; *Sanford v. Litchenberger*, 62 Neb. 501; *Portis v. Merrill*, 33 Ark. 416; *Lam-prey v. Mason*, 148 Mass. 231; *Cauthen v. Central Georgia Bank*, 69 Ga. 733; *Robbins v. Maddy*, 95 Kans. 219.)

It should be observed that the agreement in the case at bar was not that the rate prior to the maturity of the debt, as stipulated, should be increased in case payment was not made as agreed. It is, of course, immaterial that the contract for the additional instrument is expressed in an instrument contemporaneous with and separate from the bond and mortgage.

The rates which the parties have by their contract fixed must be respected. It may be that a stipulated rate may be so excessive that the contract will, should the occasion arise, be adjudged unconscionable and invalid — a question we would approach with much circumspection.

The judgment of the Special Term was entered April 15, 1914. Findings of fact are that the sum of fifty-five thousand dollars of the seventy thousand dollars, payment of which was secured by the bond, mortgage and written agreement was advanced prior to October 8, 1912, and the sum of fifteen thousand dollars was advanced on November 13, 1912. The contract to pay interest became merged in the judgment and inoperative upon its entry. The plaintiff at Special Term was adjudged the recovery of interest at the rate of six per cent per annum.

It follows that the judgment of the Appellate Division should be reversed in so far as it affirms the restriction of the plaintiff to the recovery of interest at the rate of six per cent per annum and awards costs to the Frazee Realty Company and Harry H. Frazee, and the judgment of the Special Term should be modified by adjudging additionally that the defendants pay to the plaintiff the sum of the interest at the rate of seventeen per cent per annum on fifty-five thousand dollars from October 8, 1912, to April 15, 1914, and on fifteen thousand dollars from

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November 13, 1912, to April 15, 1914, with costs in this court and the Appellate Division, and that the plaintiff have execution therefor.

CARDOZO, POUND, CRANE and ANDREWS, JJ., concur; CHASE, J., dissents; McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

In the Matter of the Application for the Probate of the Will of ELIZABETH CONNELL, Deceased.

ELIZABETH CRAIG, Appellant.

In the Matter of the Application to Set Aside a Decree Granting Ancillary Letters of Administration on the Will of ELIZABETH CONNELL, Deceased.

SADIE R. BARROWS, Appellant; FARMERS' LOAN AND TRUST COMPANY, as Ancillary Executor of ELIZABETH CONNELL, Deceased, Respondent.

Will — erroneous probate of will in this state upon theory that it had been admitted to probate in province of Quebec — invalidity of probate of such will because probate in province of Quebec failed to comply with requirements of Code of Civil Procedure and will was not properly authenticated.

Decedent died in the province of Quebec, leaving a paper purporting to be her will. On petition to the surrogate of New York county the paper was admitted to probate and ancillary letters issued thereon upon the theory that it had been admitted to probate in Quebec. Section 2695 of the Code of Civil Procedure as in force at that time, and sections 23 and 45 of the Decedent Estate Law (Cons. Laws, chap. 13) provided a complete scheme for establishing within the state wills duly probated in other countries. The surrogate, however, had no jurisdiction unless there was proof before him of the statutory requirements as to the probate in Quebec and unless the petition asking for the letters was accompanied by a copy of the will and the foreign letters, if any had been issued, authenticated as prescribed by the Decedent Estate Law. On examination of the record, it appears that there was a failure to comply with these provisions; that there was no probate of the will

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in Quebec within the meaning of our Code, and that the will was not properly authenticated. Hence, the surrogate should entertain a petition by the next of kin in proper form asking probate, and also an application by one of the next of kin to revoke the ancillary letters on the ground of want of jurisdiction, even though such next of kin was not entitled to notice of the original application therefor.

Matter of Connell, 175 App. Div. 986, reversed.

(Argued June 6, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 29, 1916, which affirmed a decree of the New York County Surrogate's Court dismissing a petition for probate of the will of Elizabeth Connell, deceased, and also a petition to revoke a decree granting ancillary letters of administration upon her estate.

The facts, so far as material, are stated in the opinion.

Willard S. Allen for Elizabeth Craig, appellant. The Surrogates' Courts of this State have jurisdiction to admit to probate after the examination of witnesses the wills of non-residents upon taking original proof irrespective of whether or not such wills have been previously proved in the courts of the sovereignty where the testators lived, resided and were domiciled. (*Moultrie v. Hunt*, 23 N. Y. 394; *Dupuy v. Wurtz*, 53 N. Y. 556; *Matter of Gaines*, 84 Hun, 520, 523; *Matter of Seabra*, 18 Wkly. Dig. 429; *Boothe v. Timoney*, 3 Dem. 415; *Walton v. Hall*, 66 Vt. 455; *Wells v. Wells*, 35 Miss. 638; *Still v. Woodville*, 38 Miss. 647; *Beers v. Shannon*, 73 N. Y. 292; Story Confl. Laws [8th ed.], 543, note a; Rorer Interstate Law, 4.)

Roger Foster for Sadie R. Barrows, appellant. The decree granting letters ancillary should be set aside because of the defects in the authentication of the papers. (Code Civ. Pro. § 2695; *Bryden v. Taylor*, 2 Harr. &

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John. 36, 399, 402; *Kirtland v. Wanzer*, 2 Duer, 278; *Las Caggas v. Larionda's Syndics*, 4 Mart. [La.] 283, 285, 286; 2 Cowen & Hill's Notes to Phil. on Ev. 260; *Baldwin v. Rice*, 183 N. Y. 55; *Talcott v. D. Ins. Co.*, 2 Wash. [C. C.] 499.) Even if the court held correctly that Mrs. Connell resided and was domiciled in Canada at the time of her death that would not prevent a motion by her next of kin to set aside the issue of the ancillary letters of administration upon the ground that there was no legal proof of the execution and probate of the will in Canada. (Code Civ. Pro. § 2514; *Matter of Regan*, 167 N. Y. 338; *Matter of Henderson*, 157 N. Y. 423; *Hyland v. Baxter*, 98 N. Y. 610; *Sipperly v. Baucus*, 24 N. Y. 46; *Heerman v. Hill*, 2 Hun, 409; *Matter of Flynn*, 136 N. Y. 287; *Matter of Harlow*, 73 Hun, 433; *Matter of Odell*, 1 Misc. Rep. 390; *Bailey v. Stewart*, 2 Redf. 212; *Bailey v. Hilton*, 14 Hun, 3; *Matter of Lyon*, 26 N. Y. Supp. 469.) The Surrogates' Courts of this state have jurisdiction to admit to probate, after the examination of witnesses, the wills of non-residents upon taking original proof irrespective of whether or not such wills have been previously proved in the courts of the sovereignty where the testators lived, resided and were domiciled. (L. 1909, ch. 18, § 23; *Moultrie v. Hunt*, 23 N. Y. 394; *Dupuy v. Wurtz*, 53 N. Y. 556; *Matter of Gaines*, 84 Hun, 520; *Matter of Seabra*, 18 Wkly. Dig. 429; *Boothe v. Timoney*, 3 Dem. 416; *Walton v. Hall*, 66 Vt. 455.)

George S. Mittendorf and *Frederick Geller* for respondent. The evidence clearly shows that Elizabeth Connell at the time of her death and at the time of the execution of said last will and testament was a resident of and domiciled in the province of Quebec, in the dominion of Canada. (*Matter of Wise*, 150 N.Y. Supp. 782; *Matter of Newcomb*, 192 N. Y. 238; *Hart v. Kip*, 148 N. Y. 306.) The papers upon which the ancillary letters were granted to the respondent were sufficient. (*Matter of Gennert*, 96 App. Div. 8.) The will is sufficiently proved

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under the laws of Quebec to entitle respondent to letters. (*Matter of Taintor*, 5 Redf. 79; *Matter of Delaplaine*, 45 Hun, 225; *Matter of Horton*, 217 N. Y. 363.) The appellants not being creditors of the deceased are not entitled to attack the granting of the ancillary letters. (*Montgomery v. Boyd*, 78 App. Div. 64; *Baldwin v. Rice*, 100 App. Div. 24; 183 N. Y. 155; *Clark v. Poor*, 73 Hun, 143; *Matter of Law*, 56 App. Div. 454; *Matter of Genert*, 96 App. Div. 8.)

ANDREWS, J. Elizabeth Connell died in the province of Quebec in 1910, leaving a paper said to be her last will and testament. She had some \$13,000 in personal property, practically all of which was in New York city.

On November 2, 1910, upon the petition of the Farmers' Loan and Trust Company, a decree containing proper recitals was made by the surrogate of New York county, recording such will and issuing ancillary letters to the petitioner. This was done upon the theory that the will had been admitted to probate in the foreign country where it was executed and where the testatrix resided at the time of her death.

On March 11th, 1911, Elizabeth Craig, one of the next of kin of the deceased, presented a petition to the surrogate of New York county asking that the will be probated there. This petition alleged that Mrs. Connell was at all times a resident of New York; that she had personal property in that city; that she left a will that had never been probated; it gave the names and addresses of the next of kin; and annexed to it was the will itself showing that the executor and legatees were included among them. It was, therefore, in proper form (Code, sec. 2614 — now sec. 2609) and Mrs. Craig was authorized to make the application. (Code of Civ. Proc., secs. 2514-2614; *Matter of Bradley*, 53 N. Y. S. R. 540.)

On May 29th, 1911, Mrs. Barrows, another of the next of kin, also presented a petition to the same surrogate

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asking that the decree as to the ancillary letters be set aside. This petition made the same allegations as to the residence of Mrs. Connell and stated that the will was made under undue influence and that the decree was irregular in that the papers upon which it was based were not authenticated as required by section 45 of the Decedent Estate Law. (Cons. Laws, ch. 13.)

The answer of the Farmers' Loan and Trust Company to both petitions was practically the same. After some denials it alleges that Mrs. Connell was a resident of Quebec and that her will was duly proved in that province.

An order of reference was then made as to the question of residence. The referee reported that Mrs. Connell was a resident of Quebec and this report was approved by the surrogate. We are bound by this finding of fact.

Thereupon the surrogate made a decree that the ancillary letters issued to the Farmers' Loan and Trust Company were proper and valid, that it was entitled to receive the personal property of the deceased, and that both petitions should be dismissed, with costs.

Former section 23 of the Decedent Estate Law, which went into effect on February 17th, 1909, provided that a will of personal property executed by a non-resident according to the laws of the testator's residence may be admitted to probate in this state. But personal property of the decedent must be found here.

But we also understand that there was another limitation imposed upon the jurisdiction of the surrogate. Where such a will had been already probated in the foreign country it may not be proved in an independent proceeding here.

Section 2695 of the Code, as it was in force in 1910, provided that where a will of personal property made by a person who resided without the state at the time of its execution or his death, had been admitted to probate within the foreign country where it was executed or where the testator resided at the time of his death, the

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Surrogate's Court having jurisdiction of the estate must, upon application accompanied by a copy of the will and of the foreign letters, if any have been issued, authenticated as prescribed by section 45 of the Decedent Estate Law, record the will and the foreign letters and issue ancillary letters testamentary with the will annexed.

This section of the Code provides a complete scheme for establishing within the state wills duly probated in other countries. New York has elected to give effect to such a decree, admitting a will of personal property to probate. (*Matter of Horton*, 217 N. Y. 363; *Baldwin v. Rice*, 100 App. Div. 241; affirmed, 183 N. Y. 55; *Clark v. Poor*, 73 Hun, 143; *Matter of Law*, 56 App. Div. 454.)

Reading these sections together, where a petition is presented by a person interested in the estate showing the death of a non-resident, the execution of the will and the presence of personal property within the surrogate's jurisdiction, it is the duty of the surrogate to admit such will, if properly executed, to probate in this state, unless it also appears that such will has been duly admitted to probate elsewhere. The burden of showing such fact is upon the party objecting to the probate.

In the case at bar the adjudication of the surrogate of New York county granting the ancillary letters is a decree *in rem* based upon the proposition that the will in question has been admitted to probate in Quebec; and if the surrogate had jurisdiction it is binding upon Mrs. Craig. But this question of jurisdiction may be raised collaterally. (*Taylor v. Syme*, 162 N. Y. 513-519.)

The surrogate had no jurisdiction to record the will and grant the ancillary letters unless there was proof before him that the will had been admitted to probate in Quebec and unless the petition asking for such letters was accompanied "by a copy of the will, and of the foreign letters, if any had been issued, authenticated as prescribed" in section 45 of the Decedent Estate Law. (*Baldwin v. Rice*, 183 N. Y. 55.)

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The unanimous affirmance of the Appellate Division does not conclude us upon this question. What was done in Quebec appears upon the face of the papers presented to the surrogate, and whether it constituted a probate within the meaning of section 2695 of the Code or whether the will presented to him was properly authenticated are both questions of law which are before us for review. (*Matter of Green*, 153 N. Y. 223.)

We think that the will was not properly authenticated.

The requirements of the Decedent Estate Law are explicit and there was a failure to comply with them.

We are also of the opinion there was no probate of the will in Quebec within the meaning of our Code. The word "probate" as there used implies a judicial determination. "A probate is a judicial act of a court having competent jurisdiction." (*Stevens' Executors v. Smart*, 1 Car. L. R. 471.) It may be true that in some countries a notarial will needs no admission to probate. It proves itself. But the legislature, familiar with our jurisprudence, did not use the words "admitted to probate" in such a sense.

Mrs. Connell executed her will some time before her death before a notary and certain witnesses. It was then registered in a certain office. Upon proof of her death the will becomes effective in Quebec and the executor named thereof by filing his acceptance before a notary public becomes entitled to administer the estate of the deceased. The result is not unlike the record of a will devising real estate.

We are, therefore, of the opinion that the surrogate erred in dismissing the petition of Mrs. Craig for the probate of the will in New York county.

We also think he was in error in dismissing the petition of Mrs. Barrows for the revocation of the ancillary letters.

It is true that when ancillary letters are asked for in this state it is only necessary that the creditors of the

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deceased should be made parties. The theory is that the decree in a foreign country being *in rem* it binds the next of kin of the deceased. The creditors are made parties so that their claims may be protected as against non-residents so far as property is here.

But where such letters have been granted without jurisdiction the next of kin are vitally interested. The decree for the ancillary letters, as we have seen, would be binding upon them as to the foreign probate and would deprive them of their right given them by statute to obtain probate in this state. Under these conditions it cannot be said that because they are not required to be made parties to the original proceeding they cannot be heard to question the jurisdiction of the surrogate to grant the decree.

The order appealed from should be reversed and the proceedings remitted to the surrogate of New York county for a rehearing, with one bill of costs to the appellants payable out of the estate.

COLLIN, CARDOZO and POUND, JJ., concur; CHASE, J., concurs in result; CRANE, J., dissents; McLAUGHLIN, J., not sitting.

Order reversed, etc.

In the Matter of the Petition of JOHN H. O'DONNELL, as Trustee under the Will of JAMES O'DONNELL, Deceased, et al., Appellants, for Leave to Sell Real Property.

JAMES J. O'DONNELL et al., Respondents.

Real property — decedent's estate — proceeding under Real Property Law (Cons. Laws, ch. 50, §§ 105, 107) for sale of trust property by trustee thereof — power of court under the statute to order sale of estates in remainder — when order directing such sale authorized and should be sustained.

1. Testator directed the trustees appointed by his will to control and pay the net income from his real estate to his widow during her life, and that no part of his real estate should be sold until

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after the arrival of the youngest son at the age of twenty-one years, nor until after the decease of his wife — the latter of which events has not occurred. The will devised the remainder of his estate to testator's four sons. The respondents are infant remaindermen, children of a deceased son. This proceeding, instituted by a petition, under sections 105 and 107 of the Real Property Law (Cons. Laws. ch. 50), seeks an order of the court authorizing and directing the petitioner to sell the real estate. Indisputably the conservation and existence of the trust estate and the creation of an income for the widow required the sale of the real estate. While the court does not possess, inherently, the power to order a sale or mortgaging of an infant's real property, the power may be given by the legislature. The language of the sections of the Real Property Law referred to as it now stands expresses clearly the legislative intention that the Supreme Court may, speaking generally, order a trustee to sell all the interests constituting the title in fee simple to real property of the trust estate, under the facts and conditions prescribed by them. Their provisions justified and authorized the order of the Special Term directing the sale which the Appellate Division reversed.

2. The court does not pass upon the question as to whether or not the sections in question of the Real Property Law validly and in fact authorized an order for the sale or mortgaging of the estates in remainder of adult parties to the proceeding without their consent for the purposes specified in the statute. (*Losey v. Stanley*, 147 N. Y. 560; *Matter of Easterly*, 202 N. Y. 466; 204 N. Y. 586, distinguished.)

Matter of O'Donnell, 178 App. Div. 928, reversed.

(Argued June 6, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 15, 1917, which reversed an order of Special Term granting an application for permission to sell real property of James O'Donnell, deceased, and denied said application.

The facts, so far as material, are stated in the opinion.

Michael J. Joyce for appellants. The conveyance of the real property, the subject of the trust, in conformity with the order of the Special Term granting leave, etc., is not a conveyance in contravention of the trust, and is

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not obnoxious to the statute prohibiting such conveyance. (*U. S. Trust Co. v. Roche*, 116 N. Y. 120; *Matter of Morris*, 133 N. Y. 693; *Ebling v. Dreyer*, 149 N. Y. 460; *Matter of Asch*, 75 App. Div. 486.) The state as *parens patriæ*, in the exercise of its sovereign power, speaking through the legislature, may lawfully authorize the sale or mortgage of the estates of infants and of other persons incompetent to manage their own affairs, and the legislation as to infants' estates, contained in sections 105 and 107 of the Real Property Law, is a legitimate and constitutional exercise of such authority. (*Powers v. Bergen*, 6 N. Y. 358; *Leggett v. Hunter*, 19 N. Y. 446; *Brevoort v. Grace*, 53 N. Y. 245; *Ebling v. Dreyer*, 149 N. Y. 460.)

Peter Condon for respondents. The court was without the power to grant the order appealed from, because the sale proposed to be made by the trustee and which was authorized by the order appealed from was in direct contravention of the terms of the trust as expressed in the will of James O'Donnell and was expressly prohibited by the terms of that instrument, and such sale is not authorized by any of the statutes which have been passed amending or supplementing the sections of the Real Property Law prohibiting such sales. (*Gobel v. Iffla*, 111 N. Y. 170; *Losey v. Stanley*, 147 N. Y. 560; *Matter of Easterly*, 202 N. Y. 466.)

COLLIN, J. The proceeding, instituted by a petition, is under sections one hundred and five and one hundred and seven of the Real Property Law (Cons. Laws, ch. 50). It seeks an order of the court authorizing and directing the petitioner, John H. O'Donnell, as successor trustee under the will of James O'Donnell, deceased, to sell the real estate devised to and controlled by the trustee. The Special Term granted the order, upon conditions irrelevant to the question presented to us, which the Appellate Division reversed, and erroneously, upon the

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ground that the court had not the power to order the sale of the estates in remainder.

The cardinal facts are: The will was probated in 1874. It devised the real estate in trust during the life of Olivia C. O'Donnell, the widow of the testator. It directed the trustees to control and pay the net income from the real estate to her during her life, and that no part of the real estate should be sold until after the arrival of the youngest son of the testator at the age of twenty-one years, nor until after the decease of his wife—the latter of which events has not occurred. It devised the remainder estate to testator's four sons. Infant remaindermen are the respondents here. Through causes which need not be detailed, the gross income from the real estate through the several years last past has not equalled and now falls far short of equalling the taxes levied upon it, while its value has greatly increased, and indisputably and obviously the conservation and existence of the trust estate and the creation of an income for the widow require the sale of the real estate. The guardian *ad litem* states in his brief for the infant respondents: "The guardian may be permitted to say here that if the court had the power to make the order asked for, ample grounds are shown by the petition and other records to justify the exercise of that power in favor of the granting of the order." The trustee has entered into a contract, subject to the approval of the court, to sell the real estate for the fair and adequate price of one hundred and forty-eight thousand dollars. All the surviving adult remaindermen filed their written consent that the order be granted.

The petitioners correctly and necessarily invoke statutory provisions as the sole source of authority to order the sale. The court does not possess, inherently, the power to order a sale or mortgaging of an infant's real property. (*Losey v. Stanley*, 147 N. Y. 560.) The power may be given by the legislature. (*Ebling v. Dreyer*, 149

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N. Y. 460; *Brevoort v. Grace*, 53 N. Y. 245.) The statutory provisions invoked are the sections of the Real Property Law already referred to and which provide: "If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section, shall be absolutely void. The Supreme Court may, by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property, or any part thereof, whenever it appears to the satisfaction of the court that said real property, or some portion thereof, has become so unproductive that it is for the best interest of such estate or that it is necessary or for the benefit of the estate to raise funds for the purpose of preserving it by paying off incumbrances or of improving it by erecting buildings or making other improvements, or that for other peculiar reasons, or on account of other peculiar circumstances, it is for the best interest of said estate, and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold if it shall appear to the court to be for the best interest of such estate. * * *." (Sec. 105.) "The Supreme Court shall not grant an order under either of the last two preceding sections unless it appears to the satisfaction of such court that a written notice stating the time and place of the application therefor has been served upon the beneficiary of such trust, and every other person in being having an estate vested or contingent in reversion or remainder in said real property at least eight days before the making thereof, if such beneficiary or other person is an adult within the state, or if a minor, lunatic, person of unsound mind, habitual drunkard or absentee, until proof of the service on such beneficiary or other person of such notice as the court or a justice thereof prescribes. * * * In case the application is granted, the final order must authorize the real property

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affected by the trust or some portion thereof, to be mortgaged, sold or leased, upon such terms and conditions as the court may prescribe. * * * A mortgage, conveyance or lease made pursuant to a final order granted as provided in this and the last two preceding sections shall be valid and effectual against all minors, lunatics, persons of unsound mind, habitual drunkards and persons not in being interested in the trust or having estates vested or contingent in reversion or remainder in said real property, and against all other persons so interested or having such estates who shall consent to such order, or who have been made parties to such proceeding as herein provided." (Sec. 107.) The language of these sections expresses clearly the legislative intention that the Supreme Court may, speaking generally, order a trustee to sell all the interests constituting the title in fee simple to real property of the trust estate, under the facts and conditions prescribed by them. The Appellate Division, however, deemed our decision in *Matter of Easterly* (202 N. Y. 466; 204 N. Y. 586) of a contrary effect, and on the authority of it reversed the order of the Special Term. That court failed to discern that there are fundamental differences between the facts of the *Easterly* case and those of the instant case.

We did decide in *Losey v. Stanley* (147 N. Y. 560) that a court was not empowered by the then existing legislation (the 65th section of the Statute of Uses and Trusts, as amended by chapter 257 of the Laws of 1886) to authorize a trustee to sell estates in remainder upon the trust estate. The legislation then existing did empower the Supreme Court to authorize a trustee to mortgage or sell real property of the trust estate whenever it appeared that the preservation or improving or the best interests of the estate required it. We held: the trust estate was, in that case, the estate for the life of the beneficiary; the estates in remainder were outside of and not within the trust estate; the statute in no wise vested in the

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court a compulsory power to order the sale or mortgage of estates outside the trust; and Chief Judge ANDREWS writing the opinion said: "It [the statute] makes no reference to infants or persons incapable of acting for themselves, and if the construction claimed could be sustained it would authorize the court to order the sale or mortgage of the estates in remainder of adults without their consent, for the purposes specified, which would be plainly unconstitutional. (*Powers v. Bergen*, 6 N. Y. 358; *Brevoort v. Grace*, 53 N. Y. 245.) * * * It was to vest in the court the power to order a sale or mortgage * * * when necessary to preserve and improve the trust estate, and this purpose is emphasized by the circumstance that notice of the application is required by the final clause of the amendment to be given only to the beneficiaries of the trust." (p. 572.) The *Losey* case was decided in November, 1895.

In March, 1897, chapter 136 of the laws of that year was enacted. It amended the Statute of Uses and Trusts as presented to us in the *Losey* case in such wise that it contained the provisions of sections one hundred and five and one hundred and seven of the Real Property Law, quoted by us, with a single difference. It provided that a mortgage, conveyance or lease made pursuant to a final order should be valid and effectual against incompetent persons "and persons not in being interested in the trust or having estates vested or contingent in reversion or remainder in said real property, and against all other persons so interested or having such estates who shall consent to such order, or who having been made parties to such proceeding as herein provided, shall not appear therein and object to the granting of such order." This provision was amended by chapter two hundred and forty-two of the Laws of 1907 by omitting from it the words "shall not appear therein and object to the granting of such order," and by changing the words "having been made parties" to "have been made parties." Our

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decision in the *Losey* case thereby became inapplicable to cases which arose after the adoption of the act of 1897. A reading, in comparison, of chapter 257 of the Laws of 1886 and the sections of the Real Property Law in question discloses with so great clearness and certainty the correctness of such statement that we deem it needless to state here a detailed and comparative analysis of those provisions. The language of the sections expresses clearly, as we have already stated, the legislative intention that the Supreme Court may, speaking generally and regardless of cases involving exceptional facts, order a trustee to sell all the interests constituting the title in fee simple to real property of the trust estate under the facts and conditions prescribed by them. Their provisions justified and authorized the order of the Special Term which the Appellate Division reversed.

Our decision in *Matter of Easterly* (202 N. Y. 466; 204 N. Y. 586) was not inconsistent with those provisions and did not authorize the reversal. We there ultimately decided that the provisions did not empower the Supreme Court to order in that case the trustee to sell real property within the trust estate to produce funds to be used in repaying to the trustee moneys which the trustee had, without need or authority, advanced toward the necessary care and maintenance of the real property, and the sum of an indebtedness of the testator creating the trust estate to the trustee. The will in that case made adequate provision, exclusive of the real property affected by the order, for paying all the debts of the testator, and for maintaining the real property. The trustee, who was also the executrix, failed to observe them. The proceeding was commenced twelve or more years after the testator's death and about nine years after the final judicial settlement of the accounts of the executrix. All of the residuary legatees and devisees under the will were adults, and by answer in the proceeding and by consistent protest and argument in all the courts objected

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to the granting of the order to sell. Upon the presentation of the appeal to this court the existence of the amending act of 1907 was not brought within our knowledge and consideration. (*Matter of Easterly*, 202 N. Y. 466.) The case standing thus before us, we held that the rules enunciated in the *Losey* case obviously dictated the reversal of the order. The briefs submitted in the motion for re-argument caused us, by directing our attention to the amendment of 1907, to discern that the decision in the *Losey* case might not control us in deciding the *Easterly* case, and to reconsider the facts upon which the order was sought. Our conclusion was that those facts did not, under the statutory conditions empowering the court to grant the order, justify or support the order, and we said: "A further examination of the record convinces us that if the amendment of 1907 has the effect claimed by counsel for the respondent nevertheless the decision on this appeal should not be changed. This further statement is made for the purpose of expressly disclaiming that the language used in the opinion reported herein in 202 N. Y. 466 was made with intent to construe and interpret the said statute of 1907. The language used in that opinion was made wholly without reference to said amendment of 1907." (*Matter of Easterly*, 204 N. Y. 586, 588.)

We do not decide or state that we have heretofore decided the question as to whether or not the sections in question of the Real Property Law validly and in fact authorize the court to order the sale or mortgaging of the estates in remainder of adult parties to the proceeding without their consent for the purposes specified in the statute. The non-consenting remaindermen here are infants.

The order should be reversed, and the order of the Special Term affirmed, without costs.

CHASE, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Order reversed, etc.

THE CITY OF YONKERS, Appellant and Respondent, *v.*
THE FEDERAL SUGAR REFINING COMPANY, Respondent
and Appellant.

Damages — injunction — liability of municipal corporation for damages caused by injunction obtained by municipality and thereafter vacated by the courts — contents of the order granting the injunction.

There was no liability at common law for damages resulting from an injunction erroneously granted save in cases of malicious prosecution. The Code requirements for security upon application for provisional remedies must be read in the light of the rule at common law, and invariably the undertaking required is limited to a sum specified by the court or judge. Special rules apply, however, to provisional remedies granted at the instance of municipal corporations. In such cases no security was required, but an amendment in 1894 to section 1980 of the Code of Civil Procedure modified the exemption so as to require that where a municipal corporation is excused from giving security on obtaining an injunction, such corporation shall be liable for all damages that may be sustained by the opposite party by reason of such order or injunction in the same case and to the same extent as sureties to an undertaking would have been if such an undertaking had been given. Sureties would be liable, however, to an extent not greater than the sum specified by the court or judge. The court or judge must, therefore, prescribe in the order of injunction the maximum extent to which a municipal corporation shall be liable. If the amount stated is too low, the defendant may move to increase it. Until some amount is stated, there is no liability on the part of the municipality.

City of Yonkers v. Federal Sugar Refining Co., 177 App. Div. 728, reversed.)

(Argued June 6, 1917; decided July 11, 1917.)

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 13, 1917, which modified and affirmed as modified an order of Special Term confirming the report of a referee appointed to assess the damages sustained by defendant by reason of an injunction *pendente lite*.

The facts, so far as material, are stated in the opinion.

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Thomas F. Curran for plaintiff, appellant and respondent. The defendant is not entitled to damages claimed to have been sustained by it for the period that the temporary injunction was in force. (Code Civ. Pro. § 620; *Edmison v. Sioux Falls Water Co.*, 73 N. W. Rep. 910; *Russell v. Farley*, 105 U. S. 433; *Roberts v. White*, 73 N. Y. 375; *High on Injunctions*, § 1675; *Crounse v. S. C. & N. Y. R. R. Co.*, 32 Hun, 497; *Guthrie v. Biethan*, 139 Pac. Rep. 718; *Mahan v. Brown*, 13 Wend. 261; *W. V. Trans. Co. v. S. O. Co.*, 50 W. Va. 611; *Andrews v. G. W. Co.*, 50 N. Y. 282; *Chicago v. A. N. Ry. Co.*, 132 N. W. Rep. 840; *Tel. Co. v. A. Tel. Co.*, 74 S. W. Rep. 218.)

Charles Philip Easton for defendant, respondent and appellant. The defendant is entitled to damages, whether or not said defendant appeared on the return of the order to show cause why a temporary injunction should not be issued. (Code Civ. Pro. § 620.) The defendant is entitled, as part of its damages, to the increased cost of manufacturing and refining sugar by reason of the injunction, and also to its loss of profits by reason of the injunction shown with reasonable certainty to have been sustained. (*M. & T. Bank v. C. W. F. Dare Co.*, 67 Hun, 44; 138 N. Y. 635; *Wakeman v. W. & W. Mfg. Co.*, 101 N. Y. 205; *Nash v. Thousand Islands Steamboat Co.*, 123 App. Div. 148; *Myer Bros. Drug Co. v. McKenny*, 137 App. Div. 541; *Central Trust Co. v. West India Improvement Co.*, 144 App. Div. 560; *Dart v. Lainbeer*, 107 N. Y. 664; *Nemrow v. Assembly Catering & Supply Co.*, 121 App. Div. 481; *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y. 335; *Roberts v. White*, 73 N. Y. 375; *Dickinson v. Hart*, 142 N. Y. 183; *Griffen v. Colver*, 16 N. Y. 489; *Hall Sons Co. v. Sundstrom & Stratton Co.*, 138 App. Div. 548.)

CARDOZO, J. In August, 1907, the city of Yonkers began an action against the Federal Sugar Refining

Company to enjoin a public nuisance. It sued in behalf of the people of the city, whose comfort and property were affected by the use of soft coal in the furnaces of the defendant's factory. On August 27, 1907, there was served an order to show cause why an injunction should not be granted during the pendency of the action. On the return day, August 29, the defendant made default, and the injunction issued. The injunction order was served on September 4, but the plaintiff consented that its effect should be suspended until September 7. On September 13 the defendant obtained an order to show cause why the injunction should not be vacated. The motion was granted on September 17, the defendant stipulating for a reference of the issues and a speedy trial. The referee gave judgment in favor of the plaintiff. The Appellate Division reversed the judgment and granted a new trial on the ground that the city was without authority to redress the wrongs of its inhabitants (136 App. Div. 701). On appeal to this court the order was affirmed, and judgment absolute was entered in favor of the defendant (207 N. Y. 724).

A petition to assess the damages resulting from the temporary injunction followed. The injunction had been in force from September 7 to September 17. The referee found that during that interval the defendant's output was diminished and its profits decreased by the use of hard coal, and he fixed the damage at \$34,578.21. He also allowed counsel fees of \$3,200. The total award with disbursements was \$38,753.21. The Appellate Division reduced the item of damage to the business to \$20,000. The other items it approved. Both parties have appealed to this court, the plaintiff from the award as reduced, and the defendant from the reduction.

There was no liability at common law for damages resulting from an injunction erroneously granted unless the case was one of malicious prosecution (*Lawton v. Green*, 64 N. Y. 326, 330; *Palmer v. Foley*, 71 N. Y. 106,

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108; *Mark v. Hyatt*, 135 N. Y. 306, 310; *Russell v. Farley*, 105 U. S. 433; *Meyers v. Block*, 120 U. S. 206; *Krzyszke v. Kamin*, 163 Mich. 290). Sometimes the chancellor made his order conditional upon the plaintiff's undertaking to assume the damages (*Russell v. Farley, supra*; *Smith v. Day*, 21 Ch. Div. 421; Chancery Rule [N. Y.] 31). But without such a condition the defendant had no remedy against the honest and cautious suitor. Public policy was thought to demand that the free pursuit of remedies in the courts should not be obstructed by the menace of liability for innocent mistake.

The Code requirements for security upon applications for provisional remedies must be read in the light of the rule at common law. Invariably the undertaking is limited to a sum specified by the court or judge. That is true in cases of arrest (Code Civ. Pro. § 559); attachment (§ 640); and injunction (§§ 611, 613, 616, 620). The general rule for injunctions is prescribed by section 620: "Where special provision is not otherwise made by law for the security to be given upon an injunction order, the party applying therefor must give an undertaking, executed by him, or by one or more sureties, as the court or judge directs, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding a sum, specified in the undertaking, as he may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled thereto" (Code Civ. Pro. § 620). The rule is not changed where the plaintiff signs without sureties. The undertaking is still the source and measure of liability (*Lawton v. Green*; *Palmer v. Foley, supra*). It is true that the court may increase the amount of an undertaking which is found to be inadequate (Code Civ. Pro. § 567, arrest; § 629, injunction; § 682, attachment). A plaintiff then has the opportunity, if he thinks the security excessive, to abandon his injunction. In any case, he counts the cost, and assumes a liability whose maximum is a determinate amount.

Special rules apply, however, to provisional remedies granted at the instance of municipal corporations. In such cases no security is required. Until an amendment in 1894, the statute was as follows (Code Civ. Pro. § 1990): "Each provision of this act, requiring a party to give security, for the purpose of procuring an order of arrest, an injunction order, or a warrant of attachment, or as a condition of obtaining any other relief, or taking any proceeding; or allowing the court, or a judge, to require such security to be given, is to be construed as excluding an action brought by the people of the state, or by a domestic municipal corporation; or by a public officer, in behalf of the people, or of such a corporation; except where the security, to be given in such an action, is specially regulated by the provision in question." Under those provisions, a municipal corporation was exempt from liability altogether (*Doyle v. City of Sandpoint*, 18 Idaho, 654; 32 L. R. A. [N. S.] 34). An amendment in 1894 modified the exemption. By chapter 90 of the laws of that year, there was added to section 1990 the following provision: "But in any action in which a domestic municipal corporation, or a public officer in behalf of such corporation, shall be, by the foregoing provisions of this section, excused from giving security on procuring an order of arrest, an order of injunction or a warrant of attachment, such corporation shall be liable for all damages that may be so sustained by the opposite party by reason of such order of arrest, attachment or injunction in the same case and to the same extent as sureties to an undertaking would have been, if such an undertaking had been given." The effect of that amendment is now to be determined.

The statute does not say that a municipal corporation shall be liable without qualification for all damages sustained by reason of the injunction. It says that the corporation shall be liable for all such damages "in the same case and to the same extent as sureties to an undertak-

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ing would have been if such an undertaking had been given." The defendant construes the statute as if those words were omitted. That is not permissible if an office and meaning may be assigned to them. To ascertain the extent of the plaintiff's liability we are to ascertain the extent to which sureties would be liable. The answer is not doubtful. Sureties would be liable to an extent not greater than the sum specified by the court or judge. They would not be liable generally. The plaintiff's liability, therefore, must be kept within like bounds. There is no difficulty in attaining that result. If the liability of a municipal corporation is to be a liability of the same extent as that of sureties on an undertaking, the judge who grants the injunction must fix the extent in the one case as in the other. Either that is so, or the statute is ineffective altogether. All that is necessary to make it workable is to embody in the injunction a provision substantially as follows: "The plaintiff, as a condition of this order, shall be liable for any damages sustained by the defendant, not exceeding a specified sum." If the amount stated is too low, the defendant may move to increase it. Until some amount is stated, there is no liability; and none was stated here.

Any other construction of the statute leads to curious results. A private litigant is not required (except in the discretion of the judge) to give sureties at all. He may give his own undertaking without sureties (Code Civ. Pro. § 620). Even so, his liability is limited. If some resident of Yonkers had brought this suit, there would have been a prescribed maximum of risk. The plain purpose of the statute was, not to impose upon municipal corporations an added burden, but to give them a special privilege. The privilege is an illusory one if this order is to be affirmed. If the defendant's position is upheld, a municipal corporation, alone among litigants, may find itself involved in a crushing and indeterminate liability because of the error of a court in holding that it was

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entitled to relief. This is the more extraordinary when we recall that until 1894 a municipal corporation was not liable at all. We can hardly doubt that if a bond with a penalty of \$100,000 or even \$20,000 had been exacted, or an equivalent limit of liability named, the plaintiff would have preferred to wait for an injunction until the trial. The defendant suffers default; and then having leisurely awaited the arrival of absent counsel, vacates the injunction and sues for estimated profits. These things happened in this case. They may happen in other cases. They point to the evils of unlimited liability.

The argument is made that in thus construing the statute, we clothe the court or judge with a power which the lawmakers have withheld. But the criticism is unwarranted. The power has been granted by implication, for it is one necessary to make the law effective. In truth, it is not a new power at all. Even without the aid of statute, courts of equity worked out the practice of conditioning the right to relief upon just and equitable terms in respect of liability for damages. That in its essence is the power which we now ascribe to the judge who grants a temporary injunction. In defining the extent of liability, he is drawing upon an ancient jurisdiction in order to give effect and meaning to the statutory scheme. He conditions the injunction upon the plaintiff's submission to liability in damages, and he fixes the maximum liability as if sureties had signed a bond.

This construction gives significance to every word of the statute; it makes the entire scheme harmonious; it saves municipal corporations from unexpected and indeterminate liabilities; it avoids the temptation otherwise offered to defendants to put forward extravagant claims; and it maintains the principle of public policy that the right to resort to the courts, when exercised in good faith, shall be kept free from the menace of unknown and unknowable penalties which intimidate the suitor, and clog his liberty of action. That principle is, of

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course, not one of universal validity; but at least it expresses the prevailing tendency of our law.

The order should be reversed, and the petition dismissed, with costs in all courts.

CHASE, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur; COLLIN, J., dissents.

Order reversed, etc.

In the Matter of the Accounting of SECURITY TRUST COMPANY OF ROCHESTER, as Executor of JAMES T. MILLER, Deceased, Appellant.

CARRIE E. MILLER, Appellant; FRANCIS C. MILLER et al., Respondents.

Will — gift of stock held by testator in manufacturing corporation — provisions of will examined and held that it was the intention of testator to give to the legatees named the specific shares of stock held by him in the manufacturing corporation named; that such legacies were not general, and that the dividends accrued on such stock should be paid to the specific legatees.

Testator bequeathed all of the shares held by him of the capital stock of the Kee Lox Manufacturing Company, in various amounts, to relatives and employees. Within the year after the granting of letters testamentary the dividends payable upon this stock amounted to a very considerable sum which, if the legacies be general, pass under the residuary clause of the will, but if specific follow the stock into the hands of the specific legatees. The testator, who was the organizer and incorporator of the corporation, owning nearly one-half of its stock, bequeathed the total amount of his holdings to his relatives and employees, directing that the executor pay all expenses out of other portions of his estate; that the executor open his deposit box in which he kept the stock, in the presence of three of the beneficiaries thereof, and that his debts be paid out of the proceeds of the stocks and bonds which he "may hold in corporations other than the Kee Lox Manufacturing Company." On examination of the terms of the will, and applying the rule that it is the intention of a testator, as gathered from his entire will, which determines whether a legacy be general or specific, held, that there

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clearly is an intention to give to the legatees named the specific stock which the testator held in the Kee Lox Manufacturing Company at the date of his will and at the time of his death. (*Tiff v. Porter*, 8 N. Y. 516, distinguished.)

Matter of Security Trust Co., 178 App. Div. 909, affirmed.

(Argued June 7, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 4, 1917, which affirmed a decree of the Monroe County Surrogate's Court judicially settling the accounts of the executors of James T. Miller, deceased.

The facts, so far as material, are stated in the opinion.

Hiram R. Wood for appellants. The legacies in question are not specific. (*Tiff v. Porter*, 8 N. Y. 516; *Crawford v. McCarthy*, 159 N. Y. 514.)

James M. E. O'Grady for Francis C. Miller et al., respondents. A testator may create a specific legacy in his own terms. (10 Am. & Eng. Ency. of Law [2d ed.], 715, 716.) The testator made a gift to certain individuals of all of the stock which he had in the Kee Lox Company at the time he made his will, specifying it by name. The fact that he divided his stock among several persons instead of giving it all to one person does not alter the fact that he intended it as a specific legacy. (*Getman v. McMahon*, 30 Hun, 531; *White v. Winchester*, 6 Pick. 48; 2 Williams on Executors [7th Am. ed.], 445, 446; *N. A. Trust Co. v. Powell*, 29 Ind. App. 394; *Davis v. Crandall*, 101 N. Y. 311.) The testator by the language of the legacies to certain of his sisters has clearly indicated the Kee Lox legacies to be specific. (*Metcalf v. Framingham*, 128 Mass. 370; *Merode v. McDonald*, [L. R.] 3 Ch. 584; *Matter of Martin*, 25 R. I. 1; *Douglass v. Douglass*, 13 App. Cas. [D. C.] 21.) The testator by directing that all other property shall be used

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to pay his debts before the Kee Lox or Crown Ribbon stock constituted the legacies of both of these stocks specific. (*Taylor v. Dodd*, 58 N. Y. 335; *Blood v. Kane*, 130 N. Y. 514; *Toch v. Toch*, 81 Hun, 410; *Cramer v. Cramer*, 35 Misc. Rep. 17; *Matter of Hastings*, 6 Dem. 311.)

George S. Van Schaick for Clarence W. Reynolds et al., respondents. The question of law as to whether these legacies are specific or general depends upon the question of fact as to the intention of the testator as gathered from the will and from the extrinsic circumstances surrounding the testator at the time the will was made. (*Tiffit v. Porter*, 8 N. Y. 516; *Wigram on Wills*, 142, 153, 154; *Matter of Hastings*, 6 Dem. 307.) The bequests of Kee Lox stock were properly held to be specific legacies because the ownership by James B. Miller of 2,024 shares of Kee Lox stock at the time of the making of the will in which he disposed of precisely that number of shares of Kee Lox stock taken in connection with his personal relations with the Kee Lox Manufacturing Company, and the relation to that company of the beneficiaries of the bequests, clearly indicated an intent on the part of the testator to refer in his will to his own shares of stock just as effectually as if he had used the word "my" in that connection. (*Tiffit v. Porter*, 8 N. Y. 516; *Unitarian Church v. Tufts*, 151 Mass. 76; *Matter of Hastings*, 6 Dem. 307; *Norris v. Thompson*, 16 N. J. Eq. 542; *Norris v. Thompson*, 15 N. J. Eq. 493; *Kunkel v. MacGill*, 56 Md. 120; *Matter of Martin*, 54 Atl. Rep. 589; *White v. Winchester*, 6 Pick. 48; *Thayer v. Paulding*, 200 Mass. 98.) The exoneration of the Kee Lox stock from the payment of debts clearly shows the intention of the testator to make the bequests of Kee Lox stock specific. (*Jacques v. Chambers*, 2 Colly. Ch. Cas. 435; *Townsend v. Martin*, 7 Hare, 471; *Fountaine v. Tyler*, 9 Price, 94; *Queen's College v. Sutton*, 12 Sim. 441.)

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Walter S. Hubbell for Effie C. Moore, respondent. The bequest of 200 shares of Kee Lox stock to Effie C. Moore, sister of the deceased, was a specific bequest of personal property and, therefore, carried with it dividends on the stock declared and paid after the death of the testator. (*Crawford v. McCarthy*, 159 N. Y. 514; 1 Cook on Corp. § 299; 4 Thomp. on Corp. § 4291; 3 Pom. Eq. Juris. § 1130; *Metcalf v. Framingham Parish*, 128 Mass. 370; *Unitarian Society v. Tufts*, 151 Mass. 76; *Thayer v. Paulding*, 200 Mass. 98; *Matter of Tyle*, 41 Misc. Rep. 596; *Matter of Bergen*, 56 Misc. Rep. 92; *Page v. Young*, L. R. 19 Eq. Cas. 501.)

CRANE, J. James T. Miller died at Rochester, New York, August 19th, 1913, leaving a last will and testament wherein he bequeathed 2,024 shares of the capital stock of the Kee Lox Manufacturing Company of Rochester, in various amounts, to thirteen relatives and seven employees of the company.

The following may be taken as the form of each such bequest, the amounts, however, differing in some cases:

"I give and bequeath to my sister, Louisa J. Reynolds, Five Thousand (5,000) Dollars; also two hundred (200) shares of stock of the Kee Lox Manufacturing Company; to my sister, Effie C. Moore, Five Thousand (5,000) Dollars, also two hundred (200) shares of stock of the Kee Lox Manufacturing Company; * * * I give and bequeath to my friend, Clara M. Meyer, one hundred (100) shares of stock of the Kee Lox Manufacturing Company."

The legatees included seven sisters, one niece, three brothers-in-law, one sister-in-law, one nephew, and seven employees of the Kee Lox Manufacturing Company.

The Security Trust Company of Rochester was appointed executor of this will, and, upon the judicial settlement of its accounts, has insisted that these are general and not specific bequests. Within the year after the granting of

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letters testamentary the dividends payable upon this stock amounted to \$68,575, which, if the legacies be general, pass under the residuary clause of the will, but if specific, follow the stock into the hands of the specific legatees.

The question presented, therefore, is whether the bequests of the Kee Lox Manufacturing Company stock are general or specific.

The surrogate and the Appellate Division have determined that they are specific, in which conclusion we concur.

James T. Miller, the testator, was one of the original incorporators of the Kee Lox Manufacturing Company, which was organized to manufacture carbon papers, type-writer ribbons, ink, and articles of like nature. The other incorporators were W. B. Pembroke and Charles J. Pembroke. The business prospered so that in 1905 the capital stock was increased from \$10,000 to \$500,000, at which time James T. Miller became the owner of 2,500 shares, and the Pembrokes of 1,250 shares each. This business was apparently the source of the testator's wealth. When James T. Miller made his will, on October 6, 1911, he owned 2,024 shares of the Kee Lox Manufacturing Company; W. P. Pembroke, 1,116 shares, and Charles J. Pembroke, 1,010; so that these three incorporators of the company at that time held between them 4,150 shares out of the 5,000 shares of capital stock. The testator was secretary and treasurer and a director of the company from the time of its formation to the time of his death, and also acted as general manager.

The Kee Lox Manufacturing Company was, therefore, Miller's creation, prospering under his management, so that the stock, closely held by the original incorporators, and not for purchase upon the market, became very valuable and was the source of a large income. Contemplating his death, the testator divided this stock, as above stated, among his relatives and seven faithful employees of the company, and, by other portions of his

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will, clearly indicated his intention to give them only the shares which he had, or the specific stock which he owned, and not general legacies equal to the value thereof.

As stated, the amount of shares owned by the testator at the date of his will was 2,024, which equals the total number of shares bequeathed. By the tenth clause of his will he directed his executor to pay all taxes on these legacies and all probate expenses out of the remainder of his estate "to the end that the beneficiaries may receive their legacies without any deduction." The shares of stock, with the exception of 150 shares which were held by the Security Trust Company as collateral to a loan, were in a safe deposit box at the Security Trust Company, and the testator directed by the thirteenth clause of the will that his executor take possession of this box and notify the beneficiaries of the stock of the time when the box would be opened, which was to be done in the presence of at least three of them. The fourteenth clause of the will reads as follows:

"For the purpose of paying my debts there shall be used and applied, first, any cash in banks or trust companies and the proceeds of my life insurance. If that is not sufficient then any stocks or bonds which I may hold in corporations other than the Kee Lox Manufacturing Company and Crown Ribbon & Carbon Manufacturing Company of Rochester, N. Y., shall be sold and the proceeds applied upon said debts."

The Crown Ribbon and Carbon Manufacturing Company stock, thus classified with the Kee Lox Manufacturing Company stock, was bequeathed by another clause in the will in the following language:

"* * * Also all *my* stock and interest in the Crown Ribbon & Carbon Manufacturing Company of Rochester, N. Y."

From this will we gather that James T. Miller, the organizer and incorporator of a successful business corporation, owning nearly one-half of its stock, bequeathed

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the total amount of his holdings to his relatives and employees, directing that the executor pay all expenses out of other portions of his estate; that the executor open his deposit box in which he kept the stock in the presence of three of the beneficiaries thereof, and that his debts be paid out of the proceeds of the stocks and bonds which he "may hold in corporations other than the Kee Lox Manufacturing Company." Here clearly is an intention to give to the legatees named the specific stock which the testator held in the Kee Lox Manufacturing Company at the date of his will and at the time of his death.

It is the intention of a testator, as gathered from his entire will, which determines whether a legacy be general or specific. (*Walton v. Walton*, 7 Johns. Ch. 258; *Tiff v. Porter*, 8 N. Y. 516; *Davis v. Crandall*, 101 N. Y. 311; *Metcalf v. Framingham Parish*, 128 Mass. 370; *Trustees of Unitarian Society in Harvard v. Tufts*, 151 Mass. 76; *Thayer v. Paulding*, 200 Mass. 98; *Ferreck's Estate*, 241 Penn. St. 340; *New Albany Trust Co. v. Powell*, 29 Ind. App. 494; *Matter of Largue*, 267 Mo. 104; *Cramer v. Cramer*, 35 Misc. Rep. 17.)

Tiff v. Porter (*supra*), so much relied upon by the appellant, goes no further than to hold that a gift of stock is a general legacy when there is nothing in the will to indicate that it is a gift of the testator's stock. Thus it is stated in the opinion: "In those cases in which legacies of stocks or shares in public funds have been held to be specific, some expression has been found from which an intention to make the bequest of the particular shares of stock could be inferred. Where, for instance, the testator has used such language as, 'my shares,' or any other *equivalent* designation, it has been held sufficient. But the mere possession by the testator at the date of his will of stock of equal or larger amount than the legacy, will not of itself make the bequest specific." (p. 518.)

The counsel in the present case concede, and the con-

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cession is supported by all the authorities, that if the word "my" had been used before the word "stock" so that the bequest which James T. Miller made had read, "I give to my sister, Louisa J. Reynolds, two hundred (200) shares of *my* stock of the Kee Lox Manufacturing Company," the bequest would have been specific. The law is not so unscientific as to insist upon the use of the word "my" when other words may clearly indicate the intention of the testator to give shares then in his ownership.

The rule is well stated, with an abundance of authority to sustain it, in the case of *Matter of Estate of Largue* (267 Mo. 104, 114): "Many of the courts of last resort of this country have broken away from the arbitrary and iron-clad English rule aforesaid, and construe legacies as specific, when bank stock or other stock is disposed of, without the use of 'my' or similar expressions, where the will upon its face, fairly discloses the intention of the testator to make a specific bequest."

And the New York authorities are not opposed to this rule, which seems so well founded in sense. Judge EARL, in *Davis v. Crandall* (101 N. Y. 311, 319), said: "Whether a legacy shall be considered specific depends upon the intention of the testator or testatrix, to be derived from the language used in the bequest, construed in the light thrown upon it by all the other provisions of the will." And such was the law applied by Judge HOUGHTON in *Cramer v. Cramer* (35 Misc. Rep. 17).

Bequests quite similar to those in the will here being construed were held to be specific in *Ferreck's Estate* (241 Penn. St. 340), where the court said: "While the rule is that a legacy is presumed to be general rather than specific, and that the mere fact that the testator in his gifts of stock gives exactly the amount of stock he has in hand is not sufficient to overcome this presumption; yet, after all, these presumptions must give way to the intent of the testator, if it can be gathered from his will

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that his thought was to make specific gifts of the stock which he owned; and this intent is not to be gathered alone from the item in which the gifts are made, but gathered from the four corners of his will. * * * After all, however, as has been said, it is the intent of the testator that has to be found, and in seeking it we are not confined to any particular word or phrase, nor to any particular part of the will, and the fact that the testator had the number of shares so given, though not controlling, is significant."

In *Thayer v. Paulding* (200 Mass. 98) it was said: "A very slight indication of an intention to give shares then in his ownership is enough to make the legacy specific in a case like this."

The Massachusetts Supreme Court in *Trustees of the Unitarian Society in Harvard v. Tufts* (151 Mass. 76) found nothing in *Tiff v. Porter* (*supra*) inconsistent with the holding that a legacy of ten shares of the stock of the Worcester and Nashua Railroad Company was a specific legacy because the eighth clause of the will gave, "The balance of my stock as per my stock book, my furniture, and all other property not otherwise disposed of by me." "This language," said Judge HOLMES, "taken with the facts, makes it pretty plain that the stock disposed of by the testatrix in the fourth clause was stock then belonging to her."

There is nothing in *Brundage v. Brundage* (60 N. Y. 544) expressing a different view than that here stated.

As the number of shares bequeathed by James T. Miller, the deceased, was the same number which he owned at the time of making his will, what, it has been asked, would have happened in case he had owned at his death a less number. In *Drake, Adm'r, v. True* (72 N. H. 322) such a situation was met by dividing the stock left by the testatrix proportionately among the legatees.

These reasons supported by the above authorities lead to an affirmance of the order of the Appellate Division.

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The order appealed from should be affirmed, with costs to each respondent filing a brief and appearing on the argument, payable out of the estate.

CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur.

Order affirmed.

JAMES F. GAVIN, a Taxpayer of the County of Rensselaer, Appellant, *v.* THE BOARD OF SUPERVISORS OF RENSSELAER COUNTY et al., Respondents.

Public officers — repayment of costs and expenses incurred by public officer in successfully defending himself against charges of misconduct — constitutionality of the statute (County Law, § 240, subd. 16) providing therefor.

1. Subdivision 16 of section 240 of the County Law (Cons. Laws, chap. 11), which provides that "The reasonable costs and expenses in proceedings before the governor for the removal of any county officer upon charges preferred against him, including the taking and printing of the testimony therein," are proper charges against a county, does not offend against the Constitution.

2. There is no greater objection to the payment of the costs and expenses incurred by a public officer in defending himself against charges of misconduct than there is to the payment of the costs and expenses incurred in the prosecution of such charges. Hence, where a sheriff defended himself against charges of official misconduct presented to the governor, which charges were dismissed, the board of supervisors of his county properly allowed the expenses incurred by him in such defense.

Gavin v. Board of Supervisors, 174 App. Div. 900, affirmed.

(Submitted June 15, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 10, 1916, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The action was brought by the plaintiff as a taxpayer

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of the county of Rensselaer against the county, its board of supervisors, sheriff and county treasurer, to prevent a waste of the county funds through the illegal action of the defendants.

It appears that in January, 1914, charges were presented to the governor of the state against the defendant Henry W. Snell, sheriff of Rensselaer county, alleging misconduct on his part and asking for his removal from office as sheriff. The defendant Snell successfully defended himself against the charges so made and on November 9, 1914, the charges were dismissed by the governor. In defending himself the sheriff incurred expenses for attorney's fees and disbursements, amounting to \$3,546.91. Thereafter he presented to the board of supervisors a claim for such expenses. The board allowed the claim and issued a warrant for the amount thereof, drawn upon the defendant John L. Bame, county treasurer, which warrant the county treasurer paid. The relief asked for by the plaintiff is that the action of the several defendants in allowing, paying and receiving the amount of the sheriff's claim against the county be declared illegal and void, and that the defendants Snell and Bame be required to repay to the county the money which Snell received. The trial court dismissed the complaint and the judgment of dismissal was affirmed by the Appellate Division.

Thomas F. Galvin for appellant. Payment of the expenses of a public officer in successfully defending himself against removal would be founded on no moral obligation and hence would be a mere gratuity. The provision of the County Law making the expenses in proceedings before the governor for the removal of any county officer county charges, means only the expenses of prosecution which would be constitutional, and does not mean the expenses of defending which would be unconstitutional. (*People ex rel. Nash v. Supervisors,*

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164 App. Div. 91; *Matter of Chapman v. City of New York*, 168 N. Y. 80; *Matter of N. Y., L. E. & W. R. Co.*, 98 N. Y. 447; *Dubuc v. Lazelle, Dalley & Co.*, 182 N. Y. 486; *Holcombe v. Leavitt*, 69 Misc. Rep. 235; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1; *M. Nat. Bank v. Shinn*, 163 N. Y. 360.) The reimbursement of the defendant Snell for his counsel fees and expenses, paid in defending himself in a proceeding to remove him from the office of sheriff, was a mere gratuity, was contrary to the prohibition contained in the Constitution and was illegal. (*Matter of Chapman v. City of New York*, 168 N. Y. 80; *Matter of Fallon*, 28 Misc. Rep. 748; *Matter of Labrake*, 29 Misc. Rep. 87; *Matter of Jensen*, 44 App. Div. 509; *Matter of Straus*, 44 App. Div. 425.) The County Law does not authorize the payment of the expenses of defending a public officer and the audit of the claim of the defendant Snell by the board of supervisors and the payment of said claim to the defendant Snell by the county treasurer was illegal. (*Matter of Chapman v. City of New York*, 168 N. Y. 80; *People ex rel. Nash v. Board of Supervisors*, 164 App. Div. 89.)

Herbert F. Roy for board of supervisors of Rensselaer county et al., respondents. The audit of the personal expenses of Henry W. Snell in defending himself against charges was not a proper and legal county charge, either for audit by the board of supervisors or for payment by the county treasurer. (Const. of N. Y. art. 8, § 10; *People ex rel. Nash v. Bd. of Suprs.*, 164 App. Div. 89.)

Frank E. McDuffee for Clarence A. Chaloner et al., as administrators of the estate of Henry W. Snell, deceased, et al., respondents. The word "proceedings," as used in the County Law, in the expression, "proceedings before the governor for the removal of any county officer," etc., means and includes the whole matter of the removal; that portion relating to the respondent as well

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as the portion relating to the relator. (*Morewood v. Hollister*, 6 N. Y. 309; *People v. City of Brooklyn*, 49 Barb. 136; *Wilson v. Allen*, 3 How. Pr. 368; *Gordon v. State ex rel. Border*, 4 Kans. 489; *A., T. & S. F. R. Co. v. Brossfield*, 32 Pac. Rep. 814; *Hopewell v. State*, 22 Ind. App. 489; *Uhe v. C., M. & S. P. Ry. Co.*, 54 N. W. Rep. 563; *Yeagen v. Wright*, 112 Ind. 235.) The history of this provision of the County Law, and the cases decided thereunder, show plainly that it was the legislative intent, which has met the approval of the courts, that the costs and expenses intended to be made a county charge were those of respondents as well as those of relator. (*People ex rel. Benedict v. Supervisors*, 24 Hun, 413; *People ex rel. Smart v. Supervisors*, 66 App. Div. 66; *People ex rel. Nash v. Supervisors*, 164 App. Div. 89.)

CUDDEBACK, J. The defendants justify the payment of the sheriff's claim against the county under the provisions of section 240 of the County Law (Cons. Laws, ch. 11). That section enumerates the charges that are proper against the county and in the sixteenth subdivision it says: "The reasonable costs and expenses in proceedings before the governor for the removal of any county officer upon charges preferred against him, including the taking and printing of the testimony therein."

It is contended on the part of the plaintiff that this provision of the County Law applies only to the costs and expenses of prosecuting the charges and does not include the costs and expenses of the officer in defending himself. The words of subdivision 16 are certainly broad enough to include the costs and expenses of the county officer in defending himself.

The application of the County Law to the case at bar will more clearly appear on a brief reference to the origin of subdivision 16, section 240. By chapter 323, Laws of

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1874, the legislature made an appropriation to pay the costs and expenses incurred by the sheriff of Clinton county in proceedings taken to remove him from office, which he successfully resisted. The act then proceeded as follows: "Hereafter in all proceedings before the governor for the removal of any county officer upon charges preferred against him, all the costs and expenses thereof, including those of taking and printing the testimony therein, shall be a county charge," etc.

This provision of the act of 1874 was subsequently placed without material change in section 240 of the County Law. (*People ex rel. Benner v. Board of Supervisors, Queens Co.*, 39 Hun, 442.)

Unless the provision of the County Law offends against section 10, article 8 of the Constitution it would seem to fully sustain the action of the board of supervisors and the other defendants in paying the amount of the sheriff's costs and expenses.

Section 10, article 8 of the Constitution is the familiar section which provides that no county, city, town or village shall give any money or property, or loan its credit to or in aid of any individual, nor shall any county, city, town or village incur any indebtedness, except for county, city, town or village purposes. It has been frequently held under this prohibition that statutes which direct counties and other municipalities to pay the costs and expenses *theretofore* incurred by a public officer in defending himself upon charges of misconduct presented to the governor or other official having the power of removal are invalid, and that such costs and expenses are not proper charges against the county or other municipality.

But in *Matter of Jensen* (44 App. Div. 509) Justice WILLARD BARTLETT, who wrote the opinion, said: "A different question would arise in considering legislation for the reimbursement of innocent parties in criminal prosecutions, if the legislation were wholly prospective in its operation. * * * It may be that purely prospective

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legislation, announcing the intention of the state to pay such expenses incurred in future cases would be deemed expressive of a public purpose." (p. 517.)

The court had at that time under consideration chapter 700, Laws of 1899, which had relation to a successful defense theretofore made by a public officer to proceedings taken for his removal from office, or to an action charging him with crime in connection with his official duties. The court there denied the petitioner's application for relief.

In *Matter of Kane v. McClellan* (110 App. Div. 44) the same justice was considering section 231 of the charter of the Greater City of New York, which provided that the board of estimate and apportionment was authorized to audit and allow as charges against the city the reasonable costs and expenses incurred by any commissioner, city magistrate or police justice in proceedings to remove him from office. The learned justice referred to his former opinion in the *Jensen* case, and continued, "The conditional promise to reimburse contained in such statute may be regarded as a part of the compensation which the state, city or town, as the case may be, stipulates that the officer shall receive in return for the services to be by him rendered." (p. 47.)

The court in the *Kane* case unanimously decided that section 231 of the city charter was not unconstitutional in so far as it was not retroactive. In *Matter of Deuel v. Gaynor* (141 App. Div. 630) the court again held on the authority of the *Kane* case that section 231 of the charter was constitutional as applied to expenses incurred and rights arising after the law was passed.

There is no greater objection to the payment of the costs and expenses incurred by a public officer in defending himself against charges of misconduct than there is to the payment of the costs and expenses incurred in the prosecution of such charges. When authorized in advance the payment of the costs and expenses of the successful

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party to a litigation is not a gift to him, but a recompense for loss actually sustained.

It follows that subdivision 16, section 240 of the County Law does not offend against the Constitution. It might be well to fix the items of the costs and expenses that may be allowed under the section, as is done in civil actions, so as to prevent the recovery of fanciful and excessive claims, but that is a matter for the legislature.

I recommend that the judgment appealed from be affirmed, with costs to respondent Henry W. Snell.

HISCOCK, Ch. J., HOGAN, CARDZOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgment affirmed.

JOHN SCHMIDT, Respondent, *v.* LEONHARDT MICHEL BREWING COMPANY, Appellant.

Master and servant — negligence — proximate cause of accident — when master not liable for injury to employee from fall of cases of beer piled in tiers on floor where he was working.

In this action, brought by a servant to recover damages for injuries received through alleged negligence of the master, it appears that plaintiff, a driver of a delivery wagon for defendant, was injured by the falling of cases of beer which were piled in tiers along the driveway where he was engaged in counting the cases in the wagon which was being loaded by other employees. The evidence did not disclose that the manner in which the cases were piled, or an act of the employee in removing the cases, caused the falling. The claim of the plaintiff is that it was caused by a defective floor under the tiers of cases. There is no proof as to how or why the condition of the boards caused the section to fall. Applying the rule that a causal connection must be shown between the defect complained of and the injury sustained, the evidence is insufficient to constitute a cause of action.

Schmidt v. Michel Brewing Co., 164 App. Div. 885, reversed.

(Argued May 3, 1917; decided July 11, 1917.)

APPEAL from a judgment, entered November 16, 1914, upon an order of the Appellate Division of the Supreme

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Court in the second judicial department which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial and reinstated said verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

James B. Henny and *Edward F. Lindsay* for appellant. There is no evidence in this case that any negligence on the part of the defendant was the proximate cause of the accident. (*Laidlaw v. Sage*, 158 N. Y. 73.)

Wilson E. Tipple for respondent. The finding of the jury is sustained by the evidence. (*Jerome v. Q. C. C. Co.*, 163 N. Y. 351; *Scarf v. Metcalf*, 107 N. Y. 211; *Stevens v. O'Neill*, 169 N. Y. 375; *Sweet v. Perkins*, 196 N. Y. 482; *Harrison v. N. Y. C. & H. R. R. Co.*, 195 N. Y. 86; *Noble v. N. Y. C. & H. R. R. Co.*, 46 N. Y. Supp. 645; 161 N. Y. 620; *N. Y. G. & I. Co. v. Gleason*, 78 N. Y. 503; *Stearns v. Field*, 90 N. Y. 640; *Gallagher v. Crooks*, 132 N. Y. 344.)

COLLIN, J. The action is, servant against master, to recover damages for the alleged negligence of the defendant. At the Trial Term the jury gave a verdict in favor of the plaintiff which the trial justice set aside. The Appellate Division, by a decision not unanimous, reinstated and directed judgment upon the verdict. We have decided that the verdict was without support in the evidence.

The facts most favorable to the plaintiff, as the jury might have found them, are: The plaintiff when injured was in the employ of the defendant, a domestic corporation, as a driver of one of its delivery wagons. The wagon had been placed, in order that it might be loaded with cases of bottled beer, in a driveway contiguous to a floor three or four inches above the surface of the driveway. Upon

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the floor, from the driveway through the space of seven feet, were piled in tiers or rows about eight feet high cases of beer with the long sides parallel with the driveway. Each row consisted of seven sections of cases. The cases were a little less than two feet in length and the aggregate weight of those in each section was about four hundred and eighty pounds. The rows extended five feet beyond the rear of the wagon. While other employees of the defendant were loading the wagon the plaintiff arrived, placed himself a short distance behind the wagon and proceeded to count, pursuant to his duty, the cases then in the wagon. An employee engaged in loading took from the floor the last case in front of the rear section of the second row and was carrying it toward the wagon and such section fell toward the driveway and the plaintiff. Two cases fell against and upon him, causing the injuries complained of. The evidence did not disclose that the manner in which the cases were piled, or an act of the employee in removing the cases, caused the falling. The claim of the plaintiff has been and is that a defective floor under the tiers of cases caused it. The cases had been there about two days. The plaintiff for about two or three months before the accident had done the same work, under the same conditions, and no accident had happened. At a prior time some empty cases had fallen from a row. There was no proof that the condition of the floor caused their fall.

The floor was laid upon joists or timbers two feet apart. It was not level. In piling the cases wooden slips were put upon the floor underneath the cases to get them straight and level. Some of the boards of the floor were rotten and loose. They were not broken, but were loose. About four weeks before the accident the foreman of the proper department had reported to the defendant this condition of the floor and parts of it, other than where the cases were piled, were repaired.

The record is barren of evidence tending to show any

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defect other than the loose and rotten boards of the floor. There is no proof as to how or why the condition of the boards caused the section to fall. It is inconceivable that the looseness of the boards from the joists caused it. The weight of the cases was upon the boards. They did not break, shake or move. The fact that they were not fastened to the joists does not reasonably permit an inference that such condition caused the falling. In two recent decisions we have declared that a causal connection must be shown between the defect and the injury. (*Scharff v. Jackson*, 216 N. Y. 598; *White v. Lehigh Valley R. R. Co.*, 220 N. Y. 131.) The rule applied in those cases determines the evidence here insufficient to constitute a cause of action.

The judgment should be reversed, with costs in the Appellate Division and this court to abide the event, and the order of the Trial Term affirmed.

HISCOCK, Ch. J., CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur; CRANE, J., dissents.

Judgment reversed, etc.

**THE TRUSTEES OF THE VILLAGE OF BATH, Appellant, v.
DANIEL J. McBRIDE et al., Respondents.**

Public officers — bonds given by official having custody of village funds — liability upon general bond not affected by fact that another bond was given for the specific fund for the loss of which recovery is sought.

1. Where the legislature requires an officer to perform a special duty and to give a special bond for the performance of that duty, no liability may attach to the general bondsmen in the absence of a declaration that they shall be liable. But that rule does not apply where a fund is placed in the hands of a treasurer for safe keeping and disbursement without any direction that a special bond be executed for the security of that fund. To relieve them there must be some intention expressed by the legislature to that effect.

2. The trustees of a village fixed the amount for which its

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treasurer should give bonds. He gave two separate bonds making up that amount. The bond upon which this suit was brought is in the precise language required by the charter of the village (L. 1895, ch. 785, tit. 2, § 11) and by a resolution adopted by its board of trustees. It purports to insure the village against any loss because of the default of its treasurer and it should be enforced in the terms in which it was written. The liability thereon is not affected by the fact that the treasurer gave another bond for the specific fund, for the loss of which recovery is sought in this action. (*Village of Bath v. McBride*, 219 N. Y. 92, followed.)

Village of Bath v. McBride, 163 App. Div. 714, reversed.

(Argued May 17, 1917; decided July 11, 1917.)

APPEAL from a judgment, entered August 22, 1914, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Fred A. Robbins and *James McCall* for appellant. The bond in question is in exact conformity with the requirements of the village charter. (L. 1895, ch. 789, § 11; *Board of Supervisors v. Otis*, 62 N. Y. 88; *York v. Goldman*, 125 N. Y. 395; *Board of Education v. Fonda*, 77 N. Y. 350; *Board of Education v. Quick*, 99 N. Y. 138.) The language of the bond signed by Peck is plain and free from ambiguity and cannot be qualified, nor can defendant's liability be limited by the alleged representations of Hallock as to the effect or meaning of the bond. (*Bonnette v. Molloy*, 209 N. Y. 167; *McShane Co. v. Padian*, 142 N. Y. 207; *Allen v. City of Oneida*, 210 N. Y. 496; *Lossing v. Cushman*, 195 N. Y. 386; *De Remer v. Brown*, 165 N. Y. 410; *Fox v. Manchester*, 183 N. Y. 141; *Riley v. Mayor*, 96 N. Y. 331; *Cortland Co. v. Herkimer Co.*, 44 N. Y. 22; *City of N. Y. v. N. Y. C. Ry. Co.*, 126

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App. Div. 36; 193 N. Y. 680; *Clapper v. Waterford*, 131 N. Y. 382.) The bond of the defendants held them liable for all moneys or other property which came into the treasurer's hands. Therefore, the defendants are liable in this action to the extent of penalty in the bond. (*People v. Vilas*, 36 N. Y. 459; *Board of Education v. Quick*, 99 N. Y. 139; *Smith v. Mollison*, 148 N. Y. 241; *People v. Lee*, 104 N. Y. 442; *Schoellkopf v. Coatsworth*, 166 N. Y. 77; *Moore v. V. F. Ins. Co.*, 28 Gratt. 508; *Harrington v. Smith*, 28 Wis. 43; *Olson v. State Bank*, 57 Minn. 552; *Murray v. Spencer*, 24 Md. 520; *Henry v. Henry*, 11 Ind. 236.)

H. V. Pratt for George W. Peck, respondent. The defendant George W. Peck is not liable for the loss of the "village hall fund." (*Peabody v. Speyers*, 56 N. Y. 230; *Peck v. Vandemark*, 99 N. Y. 29; *Coe v. Tough*, 116 N. Y. 273; *Sonneborn v. Libbey*, 102 N. Y. 539; *Barney v. Forbes*, 118 N. Y. 580; *Elmendorf v. Lansing*, 2 Cow. 468; *Kurtz v. Forquer*, 94 Cal. 91; *Tolman & Co. v. Rice*, 144 Ill. 382; *Bartlett v. Wheeler*, 195 Ill. 445; *People v. Clough*, 63 Pac. Rep. 1066.)

James O. Sebring for Daniel J. McBride, respondent.

ANDREWS, J. We must reverse the judgment of the Appellate Division and reinstate that of the trial court upon the authority of *Trustees, Vil. of Bath v. McBride* (219 N. Y. 92), unless the record contains such exceptions as would require a new trial or unless the action of the court below may be affirmed upon some theory not adopted by it.

We have discovered no exceptions that need discussion and none have been called to our attention. We turn, therefore, to the substantial question involved in this appeal.

The plaintiff is a municipal corporation. On March 6, 1912, the defendant McBride became its treasurer and

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received as such \$24,987.95 deposited with a banking firm. This sum was carried in different accounts such as the electric fund, the water works fund, the village hall fund and others. The village hall fund contained \$23,397.18 and was the result of the sale of the bonds of the village issued for the purpose of constructing a village hall. The other funds were raised by taxation for general village purposes.

At a meeting of the trustees of the village on March 19th, 1912, a resolution was adopted requiring its treasurer to give bonds in the aggregate sum of \$25,000 for the faithful performance of the duties of his office.

On April 2d, 1912, McBride, with the defendant Peck and with one Hallock as sureties, executed and delivered to the village the bond upon which this action is brought. It contained the condition required by the resolution.

On the same day McBride, with one Sutton and Hallock as sureties, executed and delivered to the village a bond in the penal sum of \$15,000. This bond recited that, whereas McBride as treasurer will receive moneys raised for the purpose of building a village hall, and whereas the trustees have fixed the amount of said treasurer's bond for this purpose at the sum of \$15,000, it is conditioned for the faithful performance by the treasurer of his duties with respect to the village hall fund.

On April 2d the trustees passed a resolution approving the bond of the defendant McBride, "Village treasurer of the Village Hall Fund in the sum of \$15,000;" and on April 16th approved the bond of McBride "As treasurer of the village funds in the sum of \$10,000."

On May 31st, 1912, the bank in which these various sums were deposited failed. At this time there was a credit to the village hall fund of \$21,840.29. With regard to the other funds, some showed a deficit and some a small credit balance, but the deficit exceeded the balance by over \$200.

Under these circumstances it is claimed that the defendant Peck is not liable for the loss of the village hall fund;

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that the bond which he signed as surety was applicable only to the general fund of the village; that the village hall fund was provided for by a bond of its own and so excluded the idea that the bond in this action had any reference thereto.

We cannot agree with this contention.

The bonds, the sale of which created the village hall fund, were apparently issued under the authority of section 128 of the Village Law. (Cons. Laws, ch. 64.) The sum represented by them was borrowed by the plaintiff and paid to it. It actually came into the hands of the village treasurer and was properly kept by him in a separate fund, as provided by section 101 of the same law. When all charges for the erection of the village hall had been paid the surplus, if any, would have been deposited in the general village fund.

Under the charter of the village of Bath, title 4, section 6 of chapter 785 of the Laws of 1895, the treasurer of the village was directed to receive all moneys belonging to it. Under section 11 of title 2 of the same act the treasurer, before entering upon the duties of his office, was required to execute and file with the village clerk a bond in such sum and with such sureties as the board of trustees shall approve conditioned that he will faithfully execute the duties of his office and account for and pay over all moneys received by him.

As we have seen, the trustees fixed the amount for which he should give bonds at \$25,000, and the treasurer did give bonds for that amount. The bond upon which this suit was brought is in the precise language required by the statute and by this resolution. Its condition is that McBride "shall faithfully execute the duties of his said office and properly account for and turn over all moneys or other properties of said village received by him." The words are clear. The fund in question comes within this definition. The trustees had no authority to take any other or different bond.

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Whether or not the \$15,000 bond issued by Sutton as surety is in the language required by statute — whether or not, in spite of its limitation to the village hall fund it should be interpreted as a general bond, is immaterial here. The bond in this action is in proper form. It purports to insure the village against any loss because of the default of its treasurer and it should be enforced in the terms in which it is written.

Why the trustees in their resolution fixing the amount of security used the word "bonds" instead of "bond" — why they approved the form of the Sutton bond is also immaterial. We can hardly assume they intended to secure a fund of over \$23,000 by a bond of \$15,000. But in any event it is not their intent which we have to determine but the intent of the legislature.

It is perfectly true that where the legislature requires an officer to perform a special duty and to give a special bond for the performance of that duty, no liability may attach to the general bondsmen in the absence of a declaration that they shall be liable. Such was the case of *Board of Supervisors v. Ehlers* (45 Wis. 281) cited by the respondents. But that rule does not apply where, as in this case, a fund is placed in the hands of the treasurer for safe keeping and disbursement without any direction that a special bond be executed for the security of that fund. To relieve them there must be some intention expressed by the legislature to that effect.

We are, therefore, of the opinion that the judgment of the Appellate Division should be reversed and that of the trial court reinstated, with costs.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND and CRANE, JJ., concur.

Judgment reversed, etc.

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JAMES STORRIER, Respondent, *v.* MOSIER & SUMMERS,
Appellant.

Master and servant — scaffold — negligence — injury to plaintiff by fall of platform or scaffold — facts examined and held that structure which fell was a scaffold within the meaning of the authorities.

The action is brought by the plaintiff to recover damages for personal injuries occasioned, as he charges, by the negligence of the defendant. The plaintiff was a plasterer employed by the defendant in the construction of a building. In order to do his work it was necessary to have a scaffold, platform or other similar structure to stand upon. Accordingly, the defendant's foreman furnished and placed in position two wooden horses about three and one-half feet high with two planks laid thereon. The plaintiff and his son got upon the structure thus provided and went to work. The son finished work first, and as he jumped to the floor he in some way overthrew the scaffold and the plaintiff fell, striking his shoulder and so received injuries for which he has recovered in this action. *Held.* that the structure was a scaffold, and that there was evidence from which the jury could have found that the wooden horses which supported the planks on which the plaintiff stood were unsafe.

Storrier v. Mosier & Summers, 166 App. Div. 968, affirmed.

(Argued May 25, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 30, 1915, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

George P. Keating for appellant. Defendant's motion for a nonsuit should have been granted, and the court's refusal to grant the same was error and the exception to such denial was well taken. (*Williams v. F. Nat. Bank*, 118 App. Div. 555; *Caddy v. I. R. T. Co.*, 195 N. Y. 415; *McCormick v. Thompson-Starrett Co.*, 80 Misc. Rep. 225.)

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Frederick Haller for respondent. The plaintiff's case was made out under the Employers' Liability Act. (L. 1910, ch. 352; *Wiley v. Solvay Process Co.*, 215 N. Y. 584; *Bidwell v. Cummings*, 217 N. Y. 542.) The plaintiff's case was also well made out under section 18 of the Labor Law. (*Caddy v. Interborough R. T. Co.*, 195 N. Y. 415; *Corbett v. New England Central*, 151 App. Div. 159; *Holsapple v. International Paper Co.*, 152 App. Div. 606; *Armenti v. Brooklyn Union Gas Co.*, 157 App. Div. 276; *Coleman v. Ruggles-Robinson Co.*, 159 App. Div. 268; *Madden v. Hughes*, 104 App. Div. 101; *Chaffee v. Union Dry Dock Co.*, 68 App. Div. 578; *Swensen v. Wilson & Bailee Mfg. Co.*, 102 App. Div. 477; *McLaughlin v. Eidritz*, 50 App. Div. 578; *Anderson v. Milliken Bros.*, 123 App. Div. 614; *Tracey v. Williams*, 127 App. Div. 126; *Grace v. Buckley*, 115 App. Div. 354.) The height of the scaffold could not make any material difference. (*McLaughlin v. Eidritz*, 50 App. Div. 518; *Caddy v. Interborough R. T. Co.*, 195 N. Y. 415; *McAllister v. Ferguson*, 50 App. Div. 530; *Stewart v. Ferguson*, 52 App. Div. 318; *Chaffee v. Union D. D. Co.*, 68 App. Div. 582; *Siverson v. Jenks*, 102 App. Div. 316; *Madden v. Hughes*, 104 App. Div. 104.)

CUDDEBACK, J. The action is brought by the plaintiff to recover damages for personal injuries, occasioned, as he charges, by the negligence of the defendant.

The plaintiff was a plasterer employed by the defendant in the construction of a building. The plasterers had finished with one of the rooms in the building, and at the time of the accident the plaintiff with his son, who is also a plasterer, was engaged in filling up the holes left in the walls for the plumbers and electricians to do their work. Some of the holes were near the ceiling of the room, and to reach them it was necessary to have a scaffold, platform or other similar structure for the plasterers to stand

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upon. Accordingly, the defendant's foreman furnished and placed in position two wooden horses about three and one-half feet high with two planks laid thereon. We must assume that the plaintiff took no part in placing the horses and planks. The plaintiff and his son got upon the structure thus provided and went to work. The son finished work first and he jumped to the floor. In doing so, he in some way overthrew the scaffold and the plaintiff fell, striking his shoulder and so received injuries for which he has recovered in this action. The accident happened June 12, 1912, and the action was brought under section 18 of the Labor Law, which provides, in substance, that a person employing another to perform labor in erecting or repairing a building, shall not furnish him with unsafe scaffolding.

The defendant, the appellant, argues that the structure which fell was not a scaffold within the meaning of section 18 of the Labor Law, and that whether it was or not is the only question in the case.

The plaintiff argues not only that the case is within the Labor Law, but also that the judgment can be sustained under the Employers' Liability Act which requires a safe place to work, or under the common-law liability of the defendant. Whether it can or not, in the view I take of the case is unimportant, because I have reached the conclusion that the structure was a scaffold.

The defendant in support of the argument that the structure was not a scaffold, cites *Williams v. First National Bank of Utica* (118 App. Div. 555, 559) and *Schapp v. Bloomer* (181 N. Y. 125, 127). In *Williams v. First National Bank* the plaintiff was injured while putting a casing on a window frame. He was standing at the time on a plank, resting on two wooden horses about eight or ten feet above the floor. The plank broke, because of some defect therein. The Appellate Division held that the structure was not a scaffold within the meaning of section 18 of the Labor Law. But the dis-

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tinguishing feature of that case is that the plank and horses were put in place by the plaintiff and his co-workers, and if the plank that broke was defective, there were other planks upon the premises which could have been used by the workmen.

Schapp v. Bloomer (supra) was a case where the plaintiff was hanging certain shafting from the ceiling of a factory building, and he stood upon planks resting partly on wooden horses and partly on large rolls of paper. This structure fell to the floor and the plaintiff was injured. There is some language in the opinion of the court which supports the plaintiff's theory in the case under consideration; but the main thing decided was that the statute imposes liability only when the work is to be done "in the erection, repairing, altering or painting of a house, building or structure." It was held that the statute limits the scaffolds, for a defect in which the master is liable, to those constructed "in the erection, repairing, altering or painting of a house, building or structure," and it was further held that the work of attaching shafting in the factory was not within the limitation of the statute.

I do not think the case falls within the principle of either of these decisions, but rather is controlled by the decision of this court in *Caddy v. Interborough Rapid Transit Co.* (195 N. Y. 415, 423). Judge WERNER in that case speaks of the impossibility of defining the word scaffold, and continues: "The inherent difficulties of the subject are such as to finally compel us to work out each case upon its own peculiar facts in the light of the manifest purpose of the legislature to secure greater protection to the employee, and to impose upon the employer directly a personal obligation which under the common law he had the right to delegate to competent employees." In the *Caddy* case the structure defined as a scaffold consisted of "painters horses" constructed like a ladder with rungs about twelve inches apart upon which were placed planks about eight feet above the floor.

Judge WERNER in his opinion in the *Caddy* case cites many Appellate Division decisions which have given the language of the statute the broad interpretation contended for here, and go far to sustain the judgment appealed from. Counsel for the appellant contends that the height of the structure above the floor, which was only three feet and six inches, indicates that it was not a scaffold within the meaning of the statute. Clearly, the height of the structure, while perhaps an important thing to consider, does not finally define its character. In *Holsapple v. International Paper Co.* (152 App. Div. 606) the plaintiff was painting a steel tube or penstock which rested on brick piers about ten feet apart. He was standing on a plank which he placed as directed by the defendant's foreman on these piers about four and a half feet above the floor, and which broke under him from some defect. This plank was held at the Appellate Division to be a scaffold within the provisions of the Labor Law. The judgment in the *Holsapple* case was affirmed on a subsequent appeal by this court (161 App. Div. 894; 216 N. Y. 746) upon the express ground that the plank was a scaffold.

The defendant makes no argument, except that the structure was not a scaffold, and it is not necessary to consider any other question. There was evidence from which the jury could have found that the wooden horses which supported the planks, on which the plaintiff stood, were unsafe.

I recommend that the judgment appealed from be affirmed, with costs.

MCLAUGHLIN, J. (concurring). The appellant relies chiefly upon *Schapp v. Bloomer* (181 N. Y. 125) and *Williams v. First National Bank of Utica* (118 App. Div. 555). The rule there laid down as to what constitutes a "scaffold" within section 18 of the Labor Law, if not in effect overruled, certainly has not been adopted

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or applied by subsequent decisions of this court. (*Caddy v. Interborough Rapid Transit Co.*, 195 N. Y. 415; *Grady v. National Conduit & Cable Co.*, 216 N. Y. 694; *Holsapple v. International Paper Co.*, 216 N. Y. 746.)

I, therefore, concur, on the authority of the latter cases, in the opinion of Judge CUDDEBACK that the judgment should be affirmed.

CHASE, COLLIN, CARDOZO, CRANE and ANDREWS, JJ., concur with CUDDEBACK, J.; McLAUGHLIN, J., reads concurring memorandum.

Judgment affirmed.

In the Matter of the Accounting of ELIZABETH P. DE G. JAMES, as Executrix of AMEDEE DE G. JAMES, Deceased, Respondent.

GEORGE W. P. DE G. JAMES et al., Appellants.

Decedent's estate — legal community under the law of France — establishment — domicile — election and estoppel applicable to property rights governed by French Code — when widow estopped from claiming legal community in her husband's estate.

1. The French Civil Code relating to legal community provides that it "is established by the simple declarations that the persons marry under the system of community, or by the non-existence of a contract." The domicile of origin is, however, presumed to continue until a new one is acquired and the intent to change the domicile especially where such change is to a foreign country must be established, and if a widow claims legal community under the French Code it is her duty under such Code to proceed promptly as therein provided to liquidate the community.

2. Assuming, but not deciding, that the provisions of the French Civil Code relating to legal community are applicable to subjects of the United States who have married in this country, their applicability can be modified or derogated by special stipulation. A widow in conjunction with her children may elect to waive any claim under such Code and take under the will of her husband and thereby become bound to carry out the terms thereof and the intent and purpose of the testator.

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3. Testator, a citizen of this state, who married in this country, resided and died in France. By his will he left certain property situate in Europe to his wife, and certain property situate in America to his children, appointing his wife executrix. The will itself does not recognize legal community as existing between the husband and wife. In a proceeding in a French court instituted by the executrix for the delivery to her of the legacies as therein provided, all the parties in interest were represented by counsel and expressly submitted their rights to the court; the children of the testator restrained from claiming certain of their rights under the law of France, and the mother restrained from claiming her right of legal community under that law. The judgment of the court was that the will should be executed according to its form and tenor. Thereafter the will was filed in a Surrogate's Court of this state and ancillary letters testamentary granted to the executrix, and in various proceedings and actions in this and another state the executrix alleged and admitted that the American property was owned by the testator at the time of his death, who, though a resident of France, had never been legally domiciled there, and that the principal as well as the income of said property was bequeathed to and belonged to her children. In her account in the present proceeding there was no suggestion in any way that the American estate was not wholly held by her in trust for the testator's children and certain grandchildren, nor was there any claim on the part of the executrix for legal community under the French law until after the proceeding had been pending for two years, nor did she submit evidence that raised a question of fact in support of her claim of legal community. *Held*, that the law of France, so far as it relates to this case, was determined by its court, and that determination should not at this late day be repudiated. That the proceedings and judgment in France, together with the proceedings in this country, and allegations and admissions of the executrix, and the conceded and undisputed evidence taken herein, are so wholly inconsistent with any claim on her part for legal community under the French Code in antagonism to the simple terms of her husband's will as to have required a decree by the Surrogate's Court against her contention.

Matter of James, 172 App. Div. 800, reversed.

(Argued April 25, 1917; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial

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department, entered July 7, 1916, which reversed a decree of the Ulster County Surrogate's Court judicially settling the accounts of the executrix of Amedee de G. James, deceased.

The following questions were certified: "(1) Did the judgment of the French court and the proceedings of the appellant thereunder estop the appellant from claiming an interest in the American property of the testator under the French law of community ?

"(2) Is the appellant estopped by her petition, answer, account and stipulations, and the conduct of the proceedings in the Surrogate's Court, from now claiming any interest in the American estate ?

"(3) Upon the entire record herein, can the French law of community apply to the matrimonial property rights of the testator and the appellant ?

"(4) Has the Appellate Division power upon this record to direct that an open commission issue to take testimony in France ?"

The facts, so far as material, are stated in the opinion.

J. Noble Hayes for George W. P. de G. James et al., appellants. The executrix's present claim to share in the American estate is entirely at variance with her pleading, account and proceedings in the Surrogate's Court and the theory as well as the evidence upon which the case was tried and disposed of. (*Southwick v. First Nat. Bank*, 84 N. Y. 420; *Bradshaw v. Mut. L. Ins. Co.*, 205 N. Y. 474; *Gordon v. Ellenville R. R. Co.*, 195 N. Y. 141; 119 App. Div. 801; *Northam v. Dutchess Co. Ins. Co.*, 177 N. Y. 75; *Brightson v. Claflin Co.*, 180 N. Y. 76; *Reed v. McConnell*, 133 N. Y. 425; *Freeman v. Grant*, 132 N. Y. 29; *Truesdell v. Sarles*, 104 N. Y. 167; *Huie v. Devore*, 138 App. Div. 679; *Scott v. Int. Paper Co.*, 125 App. Div. 322; *Cannon v. Fargo*, 138 App. Div. 24; *Rosenfeld v. Cent. Vt. R. R. Co.*, 111 App. Div. 374; *Scheu v. Union Ry. Co.*, 112 App. Div.

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240; *Snider v. Snider*, 160 N. Y. 151.) The executrix is clearly estopped by her proceedings in the French court upon the will after its probate, and the judgment rendered therein, and her subsequent acceptance of its benefits and its full recognition for many years from now claiming any interest in the American estate. (*Hilton v. Guyot*, 159 U. S. 163; *Flatauer v. Loser*, 211 N. Y. 15; *Bolton v. Schriever*, 135 N. Y. 65; *O'Donoghue v. Boies*, 159 N. Y. 87; *Haack v. Weicken*, 118 N. Y. 75; *Beets v. Stoops*, 186 N. Y. 463; *Walker v. Taylor*, 15 App. Div. 457; *Shanley v. Shanley*, 22 App. Div. 378; *Chipman v. Montgomery*, 63 N. Y. 221; *Matter of Marx*, 117 App. Div. 890; *Birmingham v. Kerwan*, 2 Sch. & Lef. 444; *Stokes v. Foote*, 172 N. Y. 324.) The French law of community has no application, either presumptive or otherwise, to the estate of the testator, Amedee de Gasquet James. (*Matter of Majot*, 199 N. Y. 29.)

Howard Chipp for Hereward von der Decken et al., appellants. There is nothing in the record to indicate that the French community law applied to the testator or his wife. On the contrary, the record conclusively demonstrates the non-application of that law. (*Dupuy v. Wurts*, 53 N. Y. 556; *Matter of Newcomb*, 192 N. Y. 238; *Hamilton v. Erie R. R. Co.*, 219 N. Y. 343.) Even were the community system applicable, the widow and executrix may not now take advantage of it as she is estopped both by judgment and *in pais*. (*Leonard v. Crommelin*, 1 Edw. Ch. 206; *Chipman v. Montgomery*, 63 N. Y. 221; *Havens v. Sackett*, 15 N. Y. 365; *Thelluron v. Woodford*, 13 Ves. 209; *Matter of Hull*, 109 App. Div. 248; *Matter of Ullmann*, 137 N. Y. 403; *Ostrander v. Hart*, 130 N. Y. 412; *Bell v. Merrifield*, 109 N. Y. 202; *Doty v. Brown*, 4 N. Y. 71; *Newton v. Hook*, 48 N. Y. 676.) Under the pleadings and proceedings in the accounting and the issues raised therein, the widow and executrix is estopped from making any claim

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herein to any part of the testator's estate in America, which is the subject of the accounting. (*R. E. Bank v. Eames*, 2 Abb. Ct. App. Dec. 83; *Walrath v. H. Ins. Co.*, 216 N. Y. 220; *Canton Brick Co. v. Howlett*, 169 N. Y. 293.)

Howard Thayer Kingsbury for Victoire L. de Libran, appellant. By her pleadings, account and proceedings herein the executrix is estopped to set up any claim on any ground whatever to any individual interest in the American estate of the testator included in her account. (*Brightson v. Clafin Co.*, 180 N. Y. 76; *Gordon v. Ellenville & Kingston R. R. Co.*, 119 App. Div. 797; 195 N. Y. 137; *Snider v. Snider*, 160 N. Y. 151; *Garvey v. McClure*, 3 Redf. 313.) By the French judgment of March 19, 1904, and her proceedings thereunder in taking possession of the European estate of the testator, the executrix is estopped to set up any claim to a community interest in the testator's estate. (*Havens v. Sackett*, 15 N. Y. 365; *Chipman v. Montgomery*, 63 N. Y. 221; *Matter of Marx*, 117 App. Div. 890.) From the undisputed facts shown by the entire record, and independent of the question of estoppel, it follows as a necessary conclusion of law that the French law of community cannot apply to the property rights of the testator and the executrix, and the remission of the case to the Surrogate's Court for a trial of this question was manifest error. (*Cole v. Executors*, 7 Martin [N. S.], 41.)

Charles S. Aronstam and *C. A. H. Bartlett* for respondent. The respondent is not estopped by her petition, answer, account and stipulations and the conduct of the proceedings in the Surrogate's Court from now claiming any interest in the American estate. (*Sly v. Hunt*, 159 Mass. 151.) The French law of community applies to the matrimonial property rights of the testator and the respondent. (Wharton on Conflict of Laws, 118, 123,

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133a; *Bonati v. Welsch*, 24 N. Y. 157.) The matrimonial property rights of the spouses should be determined by the courts of this state according to the law of France, as they were both domiciled there at the decedent's death. (*Matter of Hughes*, 95 N. Y. 60; *Matter of Majot*, 199 N. Y. 29; *Matter of Cruger*, 36 Misc. Rep. 477; *N. Y. Life Ins. & Trust Co. v. Viele*, 161 N. Y. 19; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Cross v. U. S. Trust Co.*, 131 N. Y. 330; *Matter of Dunn*, 39 App. Div. 510; *Matter of Hernandez*, 172 App. Div. 467; *Matter of Newcomb*, 192 N. Y. 238.) In the absence of a contract the property rights existing between the spouses and relative to each other are to be determined according to the law of their matrimonial domicile. (*Matter of Majot*, 199 N. Y. 29; *Graham v. First Nat. Bank, Norfolk*, 84 N. Y. 393; Wharton on Conflict of Laws, §§ 118, 121, 331a; *Le Breton v. Miles*, 8 Paige, 261; *Parsons v. Lyman*, 20 N. Y. 112; *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224; *Bonati v. Welsch*, 24 N. Y. 157; *Peterson v. Chemical Bank*, 32 N. Y. 21; *Lee v. Selleck*, 33 N. Y. 615; *King v. Sarria*, 69 N. Y. 24; *Hunt v. Hunt*, 72 N. Y. 217; *Garzot v. Rubio*, 209 U. S. 283; *Matter of Hernandez*, 172 App. Div. 477.) The judgment of the French court and the proceedings had thereunder does not estop the respondent from claiming an interest in the American property under the French law of community. (*Cook v. Conners*, 215 N. Y. 175; *Silberstein v. Silberstein*, 218 N. Y. 525.) The property rights existing between respondent and her husband are to be determined by the courts of this state according to the law of France as Amedee de Gasquet James was domiciled in France at the time of his death. (*Dammert v. Osborn*, 140 N. Y. 30; 141 N. Y. 564; *Matter of Hughes*, 95 N. Y. 60; *Matter of Barandon*, 41 Misc. Rep. 380; *Matter of Bertin*, 91 Atl. Rep. 761; *Matter of Cruger*, 36 Misc. Rep. 477; *N. Y. L. Ins. & T. Co. v. Viele*, 161 N. Y. 19; *Matter of Newell*, 38 Misc. Rep. 563, 565; *Flatner v. Loser*, 156

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App. Div. 595; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Cross v. United States Trust Co.*, 131 N. Y. 330; *Matter of Dunn*, 39 App. Div. 510; *Harvey v. Richards*, 1 Mass. 38; *Ross v. Ross*, 129 Mass. 243; *Russell v. Maddox*, 95 Ill. 485.)

CHASE, J. This is a proceeding for a voluntary accounting by an executrix named in a will and to whom ancillary letters testamentary were duly granted by the Surrogate's Court of Ulster county. The nature of the proceeding and the petition of the executrix on which it is based, assert and emphasize her attitude toward the trust when the proceeding was commenced. She thereby recognizes her fiduciary office under the will of the decedent and her duty to account as executrix in the Surrogate's Court to the "Persons interested in said decedent's American estate." A statement of the facts leading up to the proceeding is necessary to understand it and appreciate the claims of the parties to it on this appeal.

The testator, Amedee de Gasquet James, died in Dinard, France, July 28, 1903, leaving a will and codicil constituting his last will. He was born in New Orleans, a citizen of the United States, and in his will, made a short time before his death, he stated that he was an American subject. In 1881 he married, in the state of New York, Elizabeth Pratt, a citizen and resident of this state. After their marriage they resided the greater part of the time in France and other continental countries of Europe. A part of the time, however, they resided in the United States, and each of their four children was born in this country. By his will he provided as follows:

"I give and bequeath to Elizabeth Pratt, my wife:

"1. The full ownership of La Belle Issue which I inhabit, without exception, including therein all the furniture which furnishes it without exception, together with the 'objects d'art,' pictures, silverware, household plate, linen, household provisions, horses, carriages and harness,

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"2. All the furniture without exception which is contained in the house which I have rented at Dresden, Saxony.

"3. All the furniture contained in the apartment which I rent in Paris, No. 4 Avenue Bugeaud, without exception.

"I also give to my wife, Elizabeth Pratt, the full ownership of all securities without exception by me deposited either in Paris or London with bankers. I give to my wife the enjoyment during her life of all my jewels and diamonds and those of my mother."

He also provided therein as follows: "My fortune which is in America shall be divided between my children. I authorize my wife to put this fortune into the hands of one of the big trust companies (American)." He also appointed his wife "testamentary executor with seizen."

By his codicil he provided: "To complete my previous disposition I give to my wife, Elizabeth Pratt De Gasquet James, the full ownership of my two properties, La Belle Issue which I inhabit at Dinard, and La Coninais, which I possess at Taden and Dinan with all the furniture contained in these two properties."

He left him surviving besides his widow, four children, Elizabeth Bleecker, Victoire Louise, George Watson Pratt, and Pauline Andree. Victoire Louise prior to the death of her father married Raymond de Libran, and is now living; Pauline Andree since her father's death married Henry, Viscomte de la Mettrie, and is now living; Elizabeth Bleecker after her father's death married Leo Von der Decken and has since died leaving her husband her surviving, and two children, Hereward Von der Decken, and Elizabeth Von der Decken, both minors.

By an ante-nuptial agreement between Leo Von der Decken and said Elizabeth Bleecker it was covenanted and agreed that her inheritance from her father should, in case of her death, descend equally to her children, in case she should have children.

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Two days after the death of the testator and on July 30, 1903, the will was duly registered and established according to the provisions of the French Code in a proceeding before the civil tribunal of first instance at Dinan, France. In the year 1904 a proceeding was instituted in said court by the executrix to which her children were all made parties to "Require the delivery to her of the legacies." The daughter Elizabeth Bleecker being of full age, in writing consented to the delivery of the legacies made to her mother by the will of her father "In full ownership and usufruct"—and the daughter Victoire Louise appeared in the proceeding with her husband. The consul of the United States appeared as guardian *ad litem* for the infants George Watson Pratt and Pauline Andrée "by reason of the conflict of interest existing between the said minors and Mme. De Gasquet James, their mother." All being represented by counsel a judgment was rendered in the proceeding March 19, 1904, which recited: "Whereas the defendants declared that they submit their rights to the court" and it "Declared and adjudged that the testament of M. Amedee de Gasquet James * * * [giving date of the will and the codicil] be carried out according to their form and tenor."

In that proceeding the children did not in any way claim under the French Code their "droits de réservé" in any part of the estate of their father, neither did the widow and executrix make any claim of any kind under such Code to a "community" interest in the estate which her deceased husband assumed to give and bequeath by his said will.

The widow thereupon accepted the possession and ownership of the property given to her in and by said will including the San Domingo bonds which were on deposit in London, and also the control and management of the American estate. No claim is made that the testator had any property that was undisposed of by his will.

After said judgment in France and in 1904 on the

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petition of the executrix the will was filed in the office of the surrogate of the county of Ulster and ancillary letters testamentary were granted to her by that court. Soon thereafter the executrix commenced a proceeding in the Surrogate's Court of Ulster county to appraise the property of the testator in New York for the purpose of assessing the transfer tax and in her petition she included a statement of bonds, stocks and cash in New York which she alleged constituted personal property of the testator and a description of real estate within the state of New York which she alleged was owned by the testator at the time of his death. In that proceeding the net value of the said bonds, stocks, cash and real property for the purpose of such tax was determined and it was further adjudged that the tax be paid by the testator's four children. The taxes as so determined were subsequently paid by the executrix as such.

In 1907 the executrix commenced a proceeding in the state of Louisiana, to which her children were parties, in which it was adjudged that "They are hereby recognized as the only children and sole heirs and legatees of the late Amedee De Gasquet James, and as such be sent into and placed in possession as the sole and only owners of his succession and estate and property situated within the jurisdiction of this court."

In 1909 the executrix brought an action in the Supreme Court in this state making her children and the children of her deceased daughter, Elizabeth Bleecker, parties thereto. In the complaint she alleged that the testator at the time of his death "was the owner and holder of a large amount of personal property within the state of New York and still within the jurisdiction of this state and unadministered by plaintiff as sole executrix and which it is her duty to administer as soon as she lawfully and properly may do so and that the testator though resident in the said Republic of France at the time of his death had never been legally domiciled there as required

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by the laws of said Republic to constitute him a domiciled resident thereof; that his legal domicile at the time of his death was doubtful or in the state of New York."

She further alleged that doubts had arisen as to the validity, meaning and true construction of the provisions of the will relating to the American estates and that she had been advised that the same were invalid and without force or effect, and that the testator died intestate as to his personal property within the state of New York.

One or more of the children answered in the action, but it was subsequently abandoned, or at least it never came to trial.

In August, 1912, the son, George Watson Pratt, and the daughter Pauline Andree filed a petition in the Surrogate's Court of the county of Ulster praying that the letters testamentary to their mother be revoked and that the estate referred to as the "American estate" be turned over to the Farmers' Loan and Trust Company as trustee and for a judicial settlement of the accounts of their mother. The daughter Victoire Louise answered the petition and joined in the prayer thereof, and asked that her distributive share in the estate of her father be paid to her. Citations were issued upon said petition and thereafter the executrix filed her petition for an accounting, alleging that "Your petitioner is desirous of rendering an account of all proceedings as such executrix as aforesaid to the surrogate's court of the county of Ulster." The executrix then answered the petition of her son and daughter as stated, in which she refers to property, if any, left by the testator in Santo Domingo, and alleges that it "Does not form a part of his American Estate and is not included in the devise and bequest to his children." (Presumably because the bonds were in London at the time of his death.) She admits therein "that she has paid various sums to the petitioners and her other children *on account of their share in the income of said American estate.*"

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She further alleges therein "That the principal as well as the interest *was bequeathed to them* and it is possible that the payments made by her to her children may have included some portion of the *principal although her intention was to pay over only the income*. That no part of said American estate has ever been used by her * * * for her own use or been diverted or expended for any other use or purpose than to or for her said children and grand children or in the management of said fund and the discharge of her duties as executrix thereof."

She further alleges "That she has in her own right by inheritance from her father and brother and the natural increase thereof and by gift of her late husband as she is informed and believes, at least one-half million dollars unpledged and unencumbered and is amply able to respond pecuniarily for any slight overdrafts if any, upon her children's inheritance."

Among other allegations in her answer are, "That her late husband by his will authorized her as his wife, to put the property given to his children into the hands of one of the big trust companies and she has always been desirous so to do. * * * That said executrix has delayed filing her account from time to time in the hope that all her children might execute papers carrying out their father's wishes. * * * That she has been and is ready to make up and file her account and has filed a petition for that purpose."

All of the proceedings in the Surrogate's Court were thereafter consolidated by an order of that court and by consent the order provided that certain property therein described (being all or substantially all of the American estate) be turned over to the Farmers' Loan and Trust Company as custodian of the court.

After the return of the citation the executrix filed an account which purported to be a full and complete account of the testator's American estate, and there is not a suggestion in any way in connection therewith that the same

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was not wholly held by her in trust for the testator's three children and the children of the testator's deceased child. In the account she alleged that Schedule G thereof contained the names of *all persons entitled to a share of the estate either as widow, legatee or next of kin.* The only persons named in Schedule G are her son, two daughters and the husband and children of her deceased daughter. In her affidavit to the account she alleged that her late husband "owned at his death real estate, the mansion La Belle Issue at Dinard, the chateau de la Coninais near Dinan, and held under lease an expensive apartment at No. 1 Beust strasse, Dresden, Germany, and a suite of apartments in Paris." And referring to her children that "Their father's will contemplated that the principal of his American property given to them should be placed in trust for their benefit and the income only used by and for them."

Objections were filed to the account by all of the legatees.

The hearings on the proceedings were embarrassed by the fact that no inventory had been filed by the executrix and by the further fact that she did not appear personally in court until after many adjournments and until the testimony other than that to be given by herself had been received. But few witnesses were sworn. The petitioners Pauline Andree and George Watson Pratt gave testimony, also brief testimony was given by two of counsel appearing on the proceeding, by the husband of Pauline Andree, and a bookkeeper of one of the banking houses in which the securities were held. After repeated adjournments and orders relating thereto the testatrix appeared in person and was sworn as a witness. The oral testimony related to the De Gasquet James family and the expenditures by the executrix as claimed by her in her account. The petition and the objections thereto, together with the oral testimony as stated, supplemented by various records, papers and admissions by the executrix and the

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contestants, were before the Surrogate's Court, and upon such record the decree was entered. The record so formed was substantially undisputed, and, except in minor and immaterial instances, free from the possibility of contradictory inferences. It has seemed necessary to give from the record an extended history of the steps that have been taken relating to the estate of the testator, and also a general statement to show the lack of controversy and dispute in the evidence relating to the account itself. It is upon such statement that we express the opinion that the facts as shown by the record did not permit of the reversal of the decree of the Surrogate's Court by the Appellate Division. The reversal of certain findings made by the Surrogate's Court (except as hereinafter stated) was unauthorized.

The domicile of the testator and his wife at the time of their marriage was in the United States. Whatever their intention as to their future domicile at that time, it clearly appears that for several years thereafter they in fact were living in this country not only a part of their time but as we have already stated, at the birth of each of their children and at no time prior to testator's death did he spend all of his time in France. They were aliens of France. They could only enjoy in France civil rights as granted to French people by virtue of a treaty between this country and France.

The French Code relating to legal community provides that it "is established by the simple declaration that the persons marry under the system of community, or by the non-existence of a contract." (Article 1400.)

Its establishment by the non-existence of a contract must necessarily refer to marriages between French citizens or if not between French citizens then at least to marriages celebrated in France. Community is composed among other things as to assets:

"1. Of all the personal property which the husband and wife own at the time of the celebration of the mar-

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riage, together with all the personal property which comes to them during the marriage, either by way of succession or even donation, unless the donor has provided differently.
* * *. (Article 1401.)

The Civil Code also provides (Article 913): "Advantages resulting from donations *inter vivos* or from wills cannot exceed $\frac{1}{2}$ of the property of the person who has made such dispositions, if he leaves only one legitimate child at his death; one third if he leaves 2 children; $\frac{1}{4}$ if he leaves three or a greater number."

It does not in any way appear that the testator and his wife declared however simply or informally that they married under the system of legal community prescribed by the French Code, neither does it appear that the property of either was ever treated as community property. All of the evidence is to the contrary. It clearly appears by the will itself that the testator intended a complete disposition of his property real and personal and not simply a bequest and devise of his interest in the united property of himself and wife. The statement of the testatrix in her answer to the petition of her son and daughter in the Surrogate's Court which we have quoted above is a clear disclaimer of any intention on her part, past or present, to claim legal community under the French Code. She therein asserts individual ownership in the property received by her individually. She also declared in her complaint in the action brought in the Supreme Court in this state that her husband had never been legally domiciled in France.

The domicile of origin is presumed to continue until a new one is acquired and the intent to change the domicile especially where such change is to a foreign country must be established. (*Dupuy v. Wurtz*, 53 N. Y. 556-561; *Matter of Newcomb*, 192 N. Y. 238.)

If the widow had claimed legal community under the French Code it was her duty under such Code to proceed promptly as therein provided to liquidate the community

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and in so doing she would have been required to exhibit her property and at the same time the "droits de réservé" of the children would have been established, determined and satisfied. No such proceeding was ever instituted.

We do not discuss the question whether the French Code relating to legal community could be applicable to the testator and his wife as citizens of the United States married in this country, but assuming for the purpose of this decision that it could be so applicable, it was necessary in this proceeding in view of the terms of the will for the respondent if she so claimed to affirmatively show its applicability. Even if the French Code under certain circumstances clearly shown is applicable to citizens of the United States who have married in this country, its applicability could be modified or derogated by special stipulation (French Code, article 1393) and the rules of law relating to election and estoppel are applicable to persons whose property rights are governed by such Code. The executrix in conjunction with her children could elect to waive any claim under such Code and take under the will and thereby become bound to carry out the terms thereof and the intent and purpose of the testator.

The will in itself does not recognize legal community existing as between the testator and his wife. The testator therein refers to his property quite independent of any community interests therein and gives all thereof as therein described in general terms to his wife and his fortune in America to his children to be divided between them. In that respect it needs no interpretation. It was, therefore, primarily the duty of the Surrogate's Court to enforce its provisions. The executrix wholly failed to show any reason why its provisions should not be enforced in terms.

Referring again to the proceeding in the Civil Tribunal of first instance of Dinan in France, it appears that all the

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parties being represented by counsel, expressly submitted their rights to the court.

It was also therein expressly stated that the appearance of the consul of the United States for the infants was "By reason of the conflict of interest existing between the said minors and Mme. De Gasquet James, their mother." The only conflict of interest that could then have existed must have grown out of the provisions of the French Code and the right of the children to claim their droits de réservé, and of the mother her legal community under such Code. The children refrained from claiming their droits de réservé and the widow her legal community. It seems then to have been determined that neither of the parties thereto were entitled to any rights under such Code. In any event the conflict of interest existing was submitted to the court and to its decision and the judgment was that the will should be executed according to its form and tenor. Its form and tenor as we have clearly shown was that the executrix should have the property in Europe therein described and the children should have the property in America and necessarily that neither the children nor the widow were entitled to any rights under the French Code contrary to the terms of the will. The determination of the conflict, real or fanciful, thus submitted to the French court should not at this late day be repudiated. The law of France, so far as it relates to this case, was determined by its court.

The proceedings and judgment in France; the proceeding in this state to assess the transfer tax; the statement of the executrix in the legal proceeding in Louisiana and the judgment thereon; the complaint in the action brought in the Supreme Court in this state and the proceeding now before us including particularly the petition of the executrix, her answer to the petition of her son and daughter and the conceded and undisputed evidence taken herein are so wholly inconsistent with any claim on her part for legal community under the French Code

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in antagonism to the simple terms of her husband's will as to have required a decree by the Surrogate's Court against her contention. She did not submit evidence that raised a question of fact in support of her claim of legal community under the French Code. Her failure in that particular was complete. It was not until nearly eleven years after the abandonment by her children of their "droits de réservé" if any, and after repeated inconsistent actions and proceedings on her part that she asserted such a claim. It was not until after the testimony in this proceeding had all been received and then only in an application for a commission to take testimony in France relating thereto. The proceeding before the Surrogate's Court had then been pending for about two years without a suggestion of such a claim, and no application was made by her to amend the proceeding. Her application was properly denied by the Surrogate's Court. She was properly held to the allegations of her petition, answer and account. (*Walrath v. Hanover Fire Insurance Co.*, 216 N. Y. 220, 225; *Southwick v. First National Bank of Memphis*, 84 N. Y. 420; *Bradshaw v. Mutual Life Ins. Co.*, 205 N. Y. 467, 474.)

We concur in the dissenting opinion of Justice COCHRANE of the Appellate Division, except that we express no opinion on the subject of commissions to the executrix other than as stated below.

The reversal of the decree of the Surrogate's Court, so far as it affects the question of the commissions of the executrix, was based upon conclusions of fact, and without expressing any opinion relating thereto the conclusion reached by the majority of the Appellate Division should be sustained unless a rehearing is directed, which seems unwise.

It was also held by the Appellate Division upon sufficient evidence that the executrix should not have been charged with 10,000 francs agreed to be paid by her to George Watson Pratt for an automobile.

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The findings of fact (except as stated above) that were reversed by the Appellate Division were so reversed without any material contradiction of fact.

The order of the Appellate Division should be reversed and the decree of the Surrogate's Court modified by striking therefrom the charge against the executrix of 10,000 francs for an automobile purchased by her from George Watson Pratt and by allowing to the executrix her commissions on the accounting, and as so modified the decree of the Surrogate's Court is affirmed and the proceeding is remitted to the Surrogate's Court to make the change therein relating to the 10,000 francs and to determine the amount of the commissions of the executrix and credit the same to her and amend the decree accordingly, with costs in the Appellate Division and in this court to each of the parties to the proceeding appearing and filing a brief payable out of the estate on this accounting. The third question is answered in the negative. The other questions are not answered.

HISCOCK, Ch. J., HOGAN, CARDOZO, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Ordered accordingly.

JOHN H. PRICE, Respondent, *v.* THE COUNTY OF ERIE et al., Appellants.

County clerks — fees — clerk of Erie county whose salary, fixed by statute, constitutes the whole compensation to be paid to him is not entitled to any part of fees payable to county clerks under Federal statutes for services in naturalization proceedings.

This action is to recover, by virtue of a statutory provision, one-half of the fees collected and delivered to the defendants by the plaintiff, while clerk of the county of Erie, for services performed by him in naturalization proceedings. The fees in question were received by virtue of the provisions of an act of Congress (34 Stat. at Large, ch. 3592, p. 596), which authorized the clerk to retain one-half of the fees thereby required to be paid to him in such pro-

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ceedings. Our statute (L. 1885, ch. 502; L. 1891, ch. 149) provided that the clerk of the county of Erie should receive, as compensation for his services, an annual fixed salary which "shall constitute the whole compensation which shall be allowed or paid to or received by said clerk for all official services performed by him for the state, for the county and for individuals, or which he shall be required or authorized by law to perform by virtue of his office as such clerk. It shall be the duty of said clerk to perform all services which he is or shall be required or authorized by law to perform by virtue of or by reason of his holding such office, including his duties as clerk of every court of which he is or shall be clerk, and no compensation, payment or allowance shall be made to him for his own use for any of such services except the salary aforesaid." *Held*, that the federal statute did not control the ownership of the fees, and that the language of the state statute restricted the compensation for all the official services of the plaintiff as clerk of the county of Erie to the stated salary and required him to pay all fees and emoluments, including those under consideration, to the treasurer of the county.

Price v. County of Erie, 168 App. Div. 437, reversed.

(Argued May 1, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 11, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Adelbert Moot, Carleton H. White and Asher B. Emery for appellants. No part of the naturalization fees received by the plaintiff during the time that he was county clerk belonged to him, but on the contrary one-half thereof belonged to the county of Erie. The other half belonged and was paid to the bureau of immigration and naturalization. (*Freeholders v. Slater*, 84 N. J. L. 589; 85 N. J. L. 621; *San Francisco v. Mulcrevy*, 15 Cal. App. 11; 231 U. S. 669; *Barron Co. v. Beckwith*,

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142 Wis. 519; *Rhea v. Co. Comrs.*, 88 Pac. Rep. 89; *Boettcher v. Lancaster Co.*, 74 Neb. 148; *Douglas Co. v. Broadwell*, 148 N. Y. 930.)

Simon Fleischmann for respondent. Under the federal statute of 1906, plaintiff was entitled to one-half of the naturalization fees received by him and his right thereto was not affected by the act of 1885 of the legislature of the state, making the office of county clerk a salaried one. (*Co. of Montgomery v. Vosburgh*, 74 Misc. Rep. 562; *Co. of Hampden v. Morris*, 207 Mass. 167; *Chosen Freeholders of Passaic Co. v. Slater*, 88 Atl. Rep. 213; *Fields v. Multnomah County*, 128 Pac. Rep. 1045; *Eldredge v. Salt Lake County*, 37 Utah, 188; *State v. Quill*, 102 N. E. Rep. 106; *Matter of Berger*, 72 Misc. Rep. 445; *San Francisco v. Mulcrevy*, 15 Cal. App. 11.)

COLLIN, J. The action is to recover, by virtue of a statutory provision, one-half of the fees collected and delivered to the defendants by the plaintiff, while clerk of the county of Erie, for services performed by him in naturalization proceedings. Thus far it has succeeded and erroneously.

The fees were collected within the period from December 31, 1906, to October 3, 1910. The statutory provision invoked by plaintiff was in an act of congress (Ch. 3592, 34 Stat. 596) enacted June 29, 1906, entitled "An act to establish a bureau of emigration and naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States." It conferred jurisdiction to naturalize aliens as citizens of the United States upon specified courts, among which were "all courts of record in any state." It provided: "That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding: [Here follows a specification of the fees.] The clerk of any court collecting

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such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, and paid over to such Bureau within thirty days from the close of each quarter in each and every fiscal year. * * * Provided, that the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars. * * * The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive, additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance." (Section 13.)

Such statutory provision was not intended to and did not control the ownership of the fees retainable by virtue of it by the clerks of the courts of record of this state. It leaves those fees to whatever disposition may be provided by the state law, even if it be true that under the act the clerks are agents of the national government. (*Mulcrevy v. San Francisco*, 231 U. S. 669.) We must, therefore, heed the relevant laws of this state.

When the plaintiff became and while he was clerk of the county of Erie and of the courts of record therein, a statute provided: The clerk of the county of Erie should

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receive, as compensation for his services, an annual fixed salary unchangeable during his term of office and which "shall constitute the whole compensation which shall be allowed or paid to or received by said clerk for all official services performed by him for the state, for the county and for individuals, or which he shall be required or authorized by law to perform by virtue of his office as such clerk. It shall be the duty of said clerk to perform all services which he is or shall be required or authorized by law to perform by virtue of or by reason of his holding such office, including his duties as clerk of every court of which he is or shall be clerk, and no compensation, payment or allowance shall be made to him for his own use for any of such services except the salary aforesaid. * * * All the fees, emoluments and perquisites which such clerk shall charge or receive, or which he shall legally be authorized, required or entitled to charge or to receive shall belong to the county of Erie;" he shall collect all fees and emoluments "now permitted by law, and not exceeding amounts now fixed by law," as from time to time the board of supervisors shall prescribe, except that specified charges shall remain as provided by statute. He shall require payment for all services rendered by him or his assistants in his or their official capacity by virtue of any law of this state or by order of the board of supervisors; he shall keep account of all official services, and of all fees, perquisites and emoluments received or chargeable pursuant to law, and transmit to the treasurer of the county monthly a verified statement of all moneys received each day for fees, perquisites and emoluments for all services rendered, and therewith pay over the whole amount of the moneys so received; a condition of his official bond shall be that he shall safely keep and pay over to the county treasurer, as provided, all moneys which shall come into his hands; his neglect to account for any fees, perquisites or emoluments by the statute declared to belong to the county, or to render the verified

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monthly statement of or to pay over the fees received at his office shall be a misdemeanor, and subject him to a civil action for all moneys so received and not paid over. (Laws of 1885, ch. 502; Laws of 1891, ch. 149.) We are to determine whether or not the statute expresses that the fees retainable by the plaintiff, as the clerk of Erie county, under the federal act, belonged to the county of Erie. The language of the federal act, as we have stated, does not control the construction of the statute. Our duty consists in ascertaining and applying the intention of the legislature of the state as expressed in the statute.

The fees were paid to and collected by the plaintiff by virtue of his office of clerk of the county, and consequently, clerk of the courts of record within it (*Olmsted v. Meahl*, 219 N. Y. 270; *People ex rel. Wogan v. Rafferty*, 208 N. Y. 451), and as compensation for his official acts. In such official capacity alone was he entitled to them or qualified to receive them. (*Mulcrevy v. San Francisco*, 231 U. S. 669; *Freeholders of Passaic v. Slater*, 85 N. J. L. 621.) They were compensation for his services, authorized by law, as clerk of the county of Erie, and in his hands were fees or emoluments which he as such clerk was legally authorized to charge and receive. The act of Congress prescribed and directed the fees to be paid him as such clerk for those services. The fees so directed were in fact paid to and received by him for those services. Although fixed by act of Congress, they were fees or emoluments of the office within the meaning of the statute of the state. True it is that those particular services and fees were not within the legislative contemplation when the act of 1885 and the amending act of 1891 were enacted. That fact reaches no farther than the conclusion that the legislature had no particular or especial intention in regard to them—it does not bar the general legislative intention from reaching and including them. Furthermore, in naturalization proceedings fees to the clerks of the court were then prescribed by the state statute; hence, some fees for such

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services must have been in contemplation. (Laws of 1844, ch. 127, § 1; Code Civ. Pro. § 3303.) It may be true that the federal act did not and could not compel the clerk, an officer of the state (*Olmsted v. Meahl*, 219 N. Y. 270, 275), to act under it — a proposition we do not consider. (See *Freeholders of Passaic v. Slater*, 85 N. J. L. 621.) The statute of the state did not purport to compel him to collect and receive the fees prescribed by the federal act. (Section 3, as amended by Laws of 1891, ch. 149.) The plaintiff did act and the real conditions were as we have stated.

While sentences in the statute, considered in isolation, would uphold the conclusions that the legislature had in contemplation that the clerk of the county of Erie was then receiving and would thereafter receive only the "fees, perquisites and emoluments" the legislature prescribed or authorized, and those alone should belong and be paid to the county, the statute as an entirety compels another and different conclusion. Whenever a statute needing construction shows forth a general and dominant purpose, it must be construed with reference to such purpose. The purpose cannot be defeated or thwarted by selecting and isolating sentences of the statute which seem inharmonious with it. A statute must receive such reasonable construction as will, if possible, make all its parts harmonize and render them consistent with its scope and purpose. The language of the statute here shows forth clearly and definitely that the dominant purpose of the legislature was that the clerk of Erie county should, after it became effective, receive no compensation for his official services other than his fixed salary. It reveals that the legislature was not contemplating the sources, nature or amount of the fees, perquisites or emoluments which might come into the possession of the officer, but were contemplating and intending that no part whatsoever of them should belong to him or remain in his possession. The act was to restrict him

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to the statutory compensation, regardless of existing or future fees. It declared that for his services he should receive as compensation, unalterable during his term, the fixed salary, which should constitute the whole compensation for all his official services authorized by law; and "no compensation, payment or allowance shall be made to him for his own use for any of such services except the salary aforesaid. * * * All the fees, emoluments and perquisites which such clerk shall charge or receive, or which he shall legally be authorized, required or entitled to charge or to receive, shall belong to the county of Erie." He shall keep an exact and true account of all official services and of all fees, perquisites and emoluments received or chargeable pursuant to law and monthly render a statement of all moneys received for fees, perquisites and emoluments for all official services, and pay, with each statement, to the treasurer of the county the whole amount of the moneys so received by him. The language of the statute, in its plain and ordinary meaning, restricted the compensation for all the official services of the plaintiff as clerk of the county of Erie to the stated salary and required him to pay all fees and emoluments including those under consideration to the treasurer of the county. Upon such terms and conditions, the plaintiff held the office and he was obligated by them. (*Matter of Palmer*, 21 App. Div. 180; affirmed upon opinion below, 154 N. Y. 776; *Board of Supervisors Erie Co. v. Jones*, 119 N. Y. 339; *Freeholders of Passaic v. Slater*, 85 N. J. L. 621; *Barron County v. Beckwith*, 142 Wis. 519.)

The judgment should be reversed and, inasmuch as in no aspect of the complaint is plaintiff entitled to a recovery, the complaint should be dismissed, with costs to the defendants in all courts.

HISCOCK, Ch. J., CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

In the Matter of the Estate of JOHN H. SCHRIEVER,
Deceased.

JOHN H. SCHRIEVER, Appellant.

ANNIE C. McELROY, Appellant and Respondent; HENRY
J. SCHRIEVER, as Executor, Respondent.

Will — provisions of will, giving to testator's wife a life estate with remainder over if she remarries, construed and held that the gifts of remainder are equally conditioned upon either the death or remarriage of the widow.

1. It is not an unreasonable construction of a will that where a testator gives to his wife a life estate with remainder over if she remarries, he has in mind the ending of the life estate by death as well. Unless the will indicates that the testator intended otherwise, such a rule would ordinarily give effect to his meaning.

2. The will of the testator by its first clause gave the income of all of his estate to his wife "while she remains my widow, should she remarry I want my estate to be divided as follows, as written & mentioned on page 2 of this will." On page 2 various bequests are made to his daughter, nephew, brother-in-law and son, without limitation. Held, that the gifts to the daughter, the nephew, the brother-in-law and the son are all equally conditioned upon either the death or remarriage of the widow.

Matter of Schriever, 174 App. Div. 118, modified.

(Argued June 7, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered September 29, 1916, which affirmed a decree of the Rockland County Surrogate's Court construing the will of John H. Schriever, deceased.

The facts, so far as material, are stated in the opinion.

James T. Clark and Frank W. Arnold for John H. Schriever, appellant. A bequest to a testator's widow while she remains his widow, that is, for life, if she so long continues a widow, and if she shall marry, then over, is not dependent on the contingency of the widow's marrying again, but takes effect at all events on the

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determination of her estate, whether by marriage or death. (Jarman on Wills, 1361, 1362; *Luxford v. Checks*, 3 Fed. Rep. 125; *Walpole v. Lasbett*, 7 L. T. [N. S.] 526; *Matter of Martin*, 53 L. T. 34; *Gordon v. Adolphus*, 3 B. P. C. Toml. 306; 40 Cyc. of L. & P. 1655; *Trenton Trust Co. v. Armstrong*, 70 N. J. Eq. 572; *Underhill v. Roder*, 2 Ch. D. 494; 45 L. J. Ch. 266; 24 Wkly. Rep. 524; *Matter of Cane*, 60 L. J. Ch. 36; 63 L. T. Rep. [N. S.] 746; *Scarborough v. Scarborough*, 58 L. T. Rep. [N. S.] 851; *Frey v. Thompson*, 66 Ala. 287; *Meads v. Wood*, 19 Beav. 215.)

John Patterson and *Herbert C. Brinckerhoff* for *Annie C. McElroy*, appellant and respondent. The will of the testator failed to dispose of the remainder in his estate save upon the contingency that the widow remarried. (*Lynes v. Townsend*, 33 N. Y. 558; *Brown v. Quintard*, 177 N. Y. 75; *Bond v. Moore*, 236 Ill. 576; *Matter of Tamargo*, 220 N. Y. 225; *Matter of Sohn*, 24 N. Y. Supp. 350.) The language of the fifth clause is consistent with the scheme of the testator and evidences that by it he intended to dispose only of the particular fund. (Schouler on Wills, § 477; *Kerr v. Dougherty*, 79 N. Y. 327; *Matter of Wooley*, 78 App. Div. 224; *Morton v. Woodbury*, 153 N. Y. 243; *Matter of Tamargo*, 220 N. Y. 225; *Lynes v. Townsend*, 33 N. Y. 558.) A limitation over on remarriage of the widow is not a limitation over on her death, nor is it a vested remainder. (40 Cyc. of L. & P. 1655; *Smith v. Allen*, 161 N. Y. 478; *Hennessy v. Patterson*, 85 N. Y. 91.)

Frank Comisky and *Lewis M. Johnson* for respondent. There is no ground for supposing that the testator intended to die intestate as to any part of his property. (*Areson v. Areson*, 3 Den. 458, 464; *Oakes v. Massey*, 94 App. Div. 165.) The testator's intention to disinherit his daughter bears down every argument to the contrary. (*Williams v. Jones*, 166 N. Y. 522; *Robinson v. Martin*, 200 N. Y. 159.)

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ANDREWS, J. John H. Schriever died in 1910 leaving a will which was executed in 1899. He was evidently a man without education and at the time he made his will was incensed against his daughter because of her marriage. It is this will that we are called upon to construe.

It is upon a printed blank. By its first clause the testator gave the income of all his estate to his wife "while she remains my widow, should she remarry I want my estate to be divided as follows, as written & mentioned on page 2 of this will." Below this paragraph he pasted a telegram announcing the marriage of his daughter. He then appointed his son executor. Finally he signed it and two witnesses also sign. There follows the attestation clause and again the witnesses sign.

The next page of the paper is numbered two. It begins: "To my widow whatever the law allows her, in lieu of dower & remainder to be divided as hereafter mentioned."

He then confers upon his wife and his executor power to sell his real estate.

Next he gives to his daughter fifty dollars "my said daughter having married without my consent. I therefore give here the above small amount should my daughter die before the settlement of my will I bequeath said amount of (\$50) Fifty dollars to my son & executor."

He gives to his nephew, John H. Schriever, \$5,000. "If said nephew should die before my estate should be settled said sum of Five Thousand dollars should go to my son & executor."

He makes a similar bequest to his brother-in-law.

Lastly "The remainder of my real & personal estate whatever it may be, I will and bequeath to my son & executor or his heirs forever, said sum to be regulated by the first clause of my said will and testament."

There follows the recital: "I heretofore bequeath to my daughter the sum of Fifty dollars said small bequest was on account of marrying without my consent &

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knowledge, the only notice received by me was the telegram sent by her husband annexed to this will."

He then again signs the will and the two witnesses also sign.

It has been held that under this will the widow takes an estate to be terminated by her death or remarriage. If she remarries the estate passes to others, subject to her right of dower which she retains. This construction has been accepted.

The claim of the daughter is that the provisions on page two only take effect if the widow remarries. Otherwise the deceased dies intestate except as to the life estate.

The claim of the son is that the bequests to the daughter, the nephew and the brother-in-law are contingent upon the widow's remarriage. They all fail, therefore, if she does not remarry. The fifth clause is a general residuary clause that vests in the son the whole estate if the widow dies unmarried.

With this contention the surrogate agreed, as did the Appellate Division.

We construe the will differently, holding that the gifts to the daughter, the nephew, the brother-in-law and the son are all equally conditioned upon either the death or the remarriage of the widow.

Two purposes stand out clearly. The widow is to have the entire income until her death or remarriage. The daughter is to be practically disinherited.

The testator begins, therefore, by giving his wife the income for life. But if she remarries his estate is to be divided as mentioned on page two. First, what is she to receive in that event? Only her dower the surrogate has decreed, and from this decision no appeal is taken.

With that the idea of his wife's remarriage ceases to preoccupy the mind of the testator. He gives to her and to his executor the power to sell his real estate. This is not a "division" referred to on page one; nor is the

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conclusion justified that this power would cease if the widow married.

Then he gives his daughter \$50. This bequest is not conditioned on the wife's remarriage. The explanation below is inconsistent with such a theory. He has bequeathed her \$50—not \$50 in such an event. This explanation defines what the testator intended by the language he used in this bequest. But we think it also defines what he intended by the same words in the bequests to his nephew and to his brother-in-law. Then comes the remainder to his son. With the presumption against intestacy we must hold that this bequest was not dependent upon the widow's remarrying. But if so, neither are the other bequests. The words "Said sum to be regulated by the first clause" do not require a different construction for it. The phrase refers to the termination of the life estate either by death or remarriage.

It is not an unfair construction that where a testator gives to his wife a life estate with remainder over if she remarries, he has in mind the ending of the life estate by death as well. Such an idea is inevitable. Unless the will indicates that the testator intended otherwise, such a rule would ordinarily give effect to his meaning. This is especially so where, as here, he shows he has in mind the death of his wife. He speaks of the settlement of my estate or of my will—clearly the termination of the life estate by death as well as by remarriage.

Any other construction of the will is unreasonable. No satisfactory explanation can be given of a provision that would give \$5,000 to a nephew if the wife remarried—nothing if she died.

The order appealed from must be modified as indicated in this opinion, and as so modified affirmed, with costs to the appellant, John H. Schriever, to be paid out of the estate.

CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN and CRANE, JJ., concur.

Ordered accordingly.

In the Matter of the Claim of NORA DE NOYER et al.
against D. B. CAVANAUGH et al., Appellants.
STATE INDUSTRIAL COMMISSION, Respondent.

Master and servant — workman having a general and special employer — when person injured may look to either or both for compensation.

1. The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself, and he may, so far as its provisions are applicable, look to one or to the other or to both for compensation for injuries due to occupational hazards (Workmen's Compensation Law, § 3, subds. 3, 4), and the industrial commission may make such an award as the facts in the particular case may justify.

2. Claimant's intestate was driver of a truck owned by the defendant company, for the operation of which the employer of the decedent furnished a horse and driver, and his death was caused by the explosion of a can of gasoline which he was delivering in the course of his duty. An award was properly made against the general employer. (*Matter of Dale v. Saunders Bros.*, 218 N. Y. 59, followed.)

Matter of De Noyer v. Cavanaugh, 177 App. Div. 989, affirmed.

(Argued June 8, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 19, 1917, which affirmed an award of the state industrial commission under the Workmen's Compensation Law.

The facts, so far as material, are stated in the opinion.

Charles E. Spencer for appellants. Joseph E. De Noyer, the deceased, was not, in respect to the accident which resulted in his death, an employee of appellant Cavanaugh within the meaning of the provisions of the Workmen's Compensation Law. At the time of the

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accident he was the servant of the Crown Oil Company. (*Hartwell v. Simonson & Son Co.*, 218 N. Y. 345; *Schmedes v. Deffaa*, 214 N. Y. 675; *Higginson v. W. U. Tel. Co.*, 156 N. Y. 75; *Wylie v. Farmer*, 137 N. Y. 248; *Miller v. North Hudson Cont. Co.*, 156 App. Div. 348; *Standard Oil Co. v. Anderson*, 212 U. S. 215; *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271; *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514; *Matter of Rheinwald v. Builders Brick & Supply Co.*, 168 App. Div. 425; *Matter of Spratt v. Sweeney & Gray Co.*, 168 App. Div. 403; *Matter of Waters v. Taylor Co.*, 218 N. Y. 248.)

Merton E. Lewis, Attorney-General (E. C. Aiken of counsel), for respondent. D. B. Cavanaugh was a general employer of the deceased employee and the deceased employee was injured while operating a vehicle in such employment. (*Matter of Dale v. Saunders Bros.*, 218 N. Y. 59.)

POUND, J. On July 21, 1916, Joseph E. De Noyer was employed as driver of a truck by D. B. Cavanaugh, who was in the trucking business at 216 West Jefferson street, Syracuse, N. Y. The Crown Oil Company was engaged in the business of selling oil and gasoline. Cavanaugh made an arrangement with it by which he was to furnish it a horse and driver to be used in connection with a tank wagon owned by the company for the delivery of oil and gasoline, and De Noyer was employed by Cavanaugh for the purpose. While he was engaged in delivering a can of gasoline from the gasoline truck of Crown Oil Company to a store at 710 Grape street, Syracuse, N. Y., and while he was carrying the can of gasoline into the store, the gasoline exploded and his clothes took fire, causing his death. Award of compensation was made against D. B. Cavanaugh as employer.

This case is on all fours with *Matter of Dale v. Saun-*

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ders Bros. (218 N. Y. 59), in which we held that the general employer who carries on a hazardous employment is liable under the Workmen's Compensation Law for injuries sustained or death incurred by his employees, arising out of and in the course of their employment, although at the time they were working under the direction of a special employer.

We are asked to reconcile our decision in that case with our decision without opinion in *Matter of Nolan v. Cranford Co.* (171 App. Div. 959; 219 N. Y. 581) wherein an award against the special employer was upheld on similar facts except that the general employer had but one employee and was himself an employee of the special employer and was not carrying on the business of teaming except in the sense that he furnished a truck and team of horses with a driver to the special employer. It is not necessary to distinguish the cases. They are not in conflict. Where a horse and driver have been let by a general employer into the service of another, the driver is subject to the control and, therefore, is the agent of his general employer as to the care and management of the horse. (*Pigeon's Case*, 216 Mass. 51.) Even where no property of the general employer is intrusted to the employee to be used in the special employment, the general employer pays the compensation, may direct the employee when to go to work and may discharge him for refusal to do the work of the special employer. The industrial commission, therefore, has full power to make an award against the general employer. It does not follow that by the application of this rule the special employer is not to be held in any case. The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself. If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employees. (*Comerford's Case*, 224 Mass. 571, 573.) Thus

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at one and the same time they are generally the employees of the general employer and specially the employees of the special employer. As they may under the common law of master and servant look to the former for their wages and to the latter for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other or to both for compensation for injuries due to occupational hazards (Workmen's Compensation Law [Consol. Laws, chap. 67], § 3, subds. 3, 4), and the industrial commission may make such an award as the facts in the particular case may justify. Cases like *Gibley v. State* (89 Conn. 682) and *Rongo v. Waddington & Sons* (87 N. J. Law, 395) depend upon the special meaning given to the word "employee" as defined by the statutes construed and are inapplicable here. The order should be affirmed, with costs.

CHASE, COLLIN, CARDODO, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Order affirmed.

In the Matter of the Claim of ANNA SKOCZLOIS, Respondent, against PHILIP VINOCOUR et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Workmen's Compensation Law — insurance — cancellation of policy covering liability of an employer for accidents to his employees — jurisdiction of state industrial commission to determine whether employers' liability policy has been duly canceled by insurance company before an accident to an employee — erroneous decision by commission that notice of cancellation was ineffectual because name and post office of insured were misspelled.

1. Under the Workmen's Compensation Law (Cons. Laws, ch. 67, §§ 20, 23, 54, subds. 1, 2) the state industrial commission has power to determine whether a policy of insurance covering the liability of an employer had been canceled prior to the time an accident occur-

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red, or whether it was in force, and if so, the liability of the insurance company under it.

2. An insurance company issued a policy insuring an employer against accidents to his employees for a year. In the policy the insured's address was given as Philip Vanocour, Granitville, Port Richmond, Richmond county, N. Y., and his place of business 17 Vedder avenue, Port Richmond, New York. Six months later, no part of the premium having been paid, the insurance company notified the insured that it had elected to cancel the policy, such cancellation to take effect on a certain day and hour, twelve days later. The notice was in the form of a letter, sent by registered mail, directed as follows: "Mr. Philip Vincour, Vedder Avenue, Grantville, Port Richmond, N. Y." The letter reached the proper post office ten days before the cancellation was to take effect, but was never called for or delivered to the insured, although the post office authorities sent him several notices that a registered letter was in the office for delivery. On the same day the insurance company gave notice to the insured it also sent to the state industrial commission notice that under the statute (Workmen's Compensation Law, § 54, subd. 5) it had canceled the policy. Some months later an accident occurred by which an employee was fatally injured. Up to that time no premium had been paid, but three days later the insured sent a check to the insurance company which it retained and applied towards the premium due at the time the policy was canceled, leaving a small balance for which a bill was sent to the insured, asking for payment and informing him that the policy was canceled for non-payment of premium. Held, that the industrial commission had jurisdiction to determine whether the policy had been canceled, but that it erred in deciding that the attempt by the insurance company to cancel the policy was ineffectual because Vinocour was written "Vincour" and Granitville "Grantville."

3. The fact that after the cancellation the company sent its representative to the insured's place of business to check up his payrolls for the purpose of ascertaining the exact amount of premium due when the policy was canceled, does not estop the company. Nor is the fact that the company accepted part of the premium after the accident of any importance, since the insured was only paying a part of what he owed when the cancellation took place.

Skoczlois v. Vinocour, 176 App. Div. 924, modified.

(Argued June 8, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 17, 1917, which affirmed an award of the state industrial commission under the Workmen's Compensation Law.

The facts, so far as material, are stated in the opinion.

William H. Foster, T. C. Jones and James B. Henney for appellants. The insurance carrier complied with the Workmen's Compensation Law, section 54, part 5, when it mailed by registered letter, giving at least ten days' notice, a notice of cancellation to the assured at his last known place of residence and at the same time notified the commission of that cancellation and it is immaterial whether the assured received the notice of cancellation. (*Wolarsky v. N. Y. Life Ins. Co.*, 120 App. Div. 99; *McConnell v. P. S. Life Assn. Society*, 92 Fed. Rep. 769; *N. Y. Life Ins. Co. v. Scott*, 57 S. W. Rep. 677.) "Place of residence" as used in section 54, paragraph 5, of the Workmen's Compensation Law, relates to the post office and not to any particular locality in a town or city. That being the case the stenographic error of Grantville for Granitville had no force and effect, particularly since the notice was received at the right post office and the assured notified. (*Oothout v. Rhinelander*, 10 How. 460.)

Merton E. Lewis, Attorney-General (*E. L. Aiken* of counsel), for respondent. Where a notice is relied upon in the cancellation of a policy of insurance, against the will of the insured, the parties relying upon the notice must show that the same was delivered. (*Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 618.) The commission had jurisdiction to determine the question as to whether the policy of insurance had been canceled. (L. 1914, ch. 41, §§ 20, 23, 26; *Wester v. I. A. Comm.*, 157 Pac. Rep. 593.)

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McLAUGHLIN, J. This appeal is from an order of the Appellate Division, third department, affirming an award of the workmen's compensation commission for the death of Stanislaus Skoczlois, husband of the claimant. The appellants contend the order and award should be reversed and the claim dismissed (1) because there is no evidence to support the findings of the commission that Skoczlois died as the result of an accident arising out of and in the course of his employment; and (2) because the policy of insurance had been canceled prior to the accident.

As to the first contention, a careful consideration of the record satisfies me that the findings made by the commission and affirmed by the Appellate Division are correct, but as to the second they are erroneous. The policy was issued on the 13th of July, 1914, and in consideration of the premium agreed to be paid (\$30.90) the company insured Vinocour against accidents to his employees for a term of one year. Under the terms of the policy Vinocour's post-office address was given as Granitville, Port Richmond, Richmond county, New York, and his place of business 17 Vedder avenue, Port Richmond, New York. Vinocour did not pay the premium at the time the policy was issued, or any part of it until after the accident to and death of Skoczlois. On the 19th of December, 1914, no part of the premium having been paid, the insurance company notified Vinocour it had elected to cancel the policy, such cancellation to take effect on December 31, 1914, at midnight. The notice was in the form of a letter, sent by registered mail, directed as follows: "Mr. Philip Vincour, Vedder avenue, Grantville, Port Richmond, N. Y." The letter reached the proper post office on the 21st of December, 1914, but was never called for by or delivered to Vinocour though the post office authorities at that place sent him several notices that a registered letter was in the office ready for delivery. It remained in the post office until

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January 8, 1915, when it was returned to the insurance company. On the same day that the insurance company gave notice to Vinocour it had canceled the policy it also gave notice to the commission that the policy had been canceled, and at the same time wrote it as follows: "In accordance with Sub-division 5 of Section 54 of the New York Compensation Law, we have canceled the above policy, copy of the notice of cancellation being attached hereto, which please file." The accident occurred and Skoczlois died on the 5th of May, 1915, and up to that time no part of the premium had been paid, but three days thereafter Vinocour sent a check for ten dollars to the insurance company, which it retained and applied towards the premium due at the time the policy was canceled. After making such application there still remained due \$2.35, for which it sent a bill to Vinocour, asking for payment, and at the same time informed him that the policy was canceled on the 31st of December, 1914, for non-payment of premium.

The commission reached the conclusion, and this apparently was the view of the Appellate Division, that the attempt on the part of the insurance company to cancel was ineffectual by reason of the fact that Vinocour was written "Vincour" and Granitville "Grantville." I think this is too technical and narrow a view to take of the matter, especially in view of the fact that no one was misled by the mis-spelling. To hold otherwise is to sacrifice substance for form, notwithstanding the letter reached the proper post office and the authorities understood for whom it was intended and gave such person notice of its being there ready for delivery.

The policy provided that it might be canceled by sending to the insured at his last known place of residence a notice by registered letter ten days prior to the time such cancellation took effect, and at the same time giving the commission notice that the policy had been canceled. The notices thus given not only complied with the policy,

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but with the statute relating to cancellation. (Workmen's Compensation Law, § 54, part 5.) It was immaterial, therefore, whether the insured received the notice or not. The company had done all it was required to do to cancel the policy and the cancellation became effective in accordance with the notice on the 31st of December, 1914, at midnight. (*Wolarsky v. New York Life Ins. Co.*, 120 App. Div. 99; *McConnell v. Provident Savings Life Assur. Soc.*, 92 Fed. Rep. 769.) That he did not receive the notice was due entirely to his own fault.

Evidence was introduced before the commission to the effect that in March, 1915, the company sent its representative to the insured's place of business to check up his payrolls for the purpose of ascertaining the exact amount of premium due when the policy was canceled. Such representative did not inform the insured what the purpose was in checking up the payrolls or that the policy had been previously canceled, and it is suggested for this reason the company, having knowledge that the insured never had received the notice of cancellation, should be estopped from asserting that the policy was canceled. I am unable to appreciate the force of this suggestion. It was only by an inspection of the payrolls that the exact amount of premium due when the policy was canceled could be ascertained. The policy had previously been canceled. The notice required to bring about that result had been given. The policy as a binding obligation on the part of the company had ceased to exist. Mere silence thereafter on the part of the company could not reinstate it, nor can anything that the company did be held to estop it from asserting whatever rights it might have by reason of the cancellation. Nor is the fact that the company accepted a part of the premium after the accident to Skoczlois of any importance. The insured was only paying a part of what he owed when the cancellation took place.

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It is also suggested that the commission did not have the power to determine whether the policy had been canceled. I think it had jurisdiction of the subject-matter and the power to make such determination. The act seems, inferentially at least, to confer such power. Under section 20 the commission is given full power and authority to determine all questions in relation to the payment of claims, and under section 23 an award made by it is final and conclusive upon all questions within its jurisdiction as against the state fund or between the parties. Section 26 (amd. L. 1915, ch. 167) expressly provides that "If payment of compensation * * * due under the terms of an award, be not made by the employer within ten days after the same is due, the insurance carrier shall be liable therefor." Subdivision 1 of section 54 provides, in substance, that every policy issued by an insurance company covering the liability of the employer shall contain a provision setting forth the right of the commission by making the insurance company a party to the original application to enforce the liability against it. It would seem necessarily to follow that if the insurance company may be made a party to the original application to the commission for compensation, all its rights may be there litigated and determined precisely the same as those of the employer. The latter can raise the question, and have it determined as to whether the relation of employer and employee existed at the time the accident occurred, and for the same reason I think the insurance company can raise and have the question determined as to whether there were then a valid outstanding policy issued by it. If such questions be raised, then the determination of them lies with the commission. This view is strengthened by subdivision 2 of the same section, which provides, "That jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards

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rendered against the employer for the payment of compensation under the provisions of this chapter."

In order to give full effect to the provisions of the statute referred to it seems to me necessarily to follow that the legislature intended the commission should have power in the first instance to determine whether a policy of insurance covering the liability of the employer were in force when the accident occurred, and if so, the liability of the insurance company under it. (*Matter of Kelley*, 116 N. E. Rep. 308.) Unless this be the correct view of the statute, the scheme contemplated by it fails to a large extent at least, of its purpose.

It follows that the order of the Appellate Division and the award of the compensation commission, so far as the same relate to the insurance company, should be reversed and the claim as to it dismissed, and as to the employer, the order of the Appellate Division and award of the commission should be affirmed, with costs to the state industrial commission against the employer.

CHASE, COLLIN, CARDODOZO, POUND, CRANE and ANDREWS, JJ., concur.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GERTRUDE CRANE, as Administratrix of the Estate of GEORGE W. SAUER, Deceased, Respondent, *v.* WILLIAM C. ORMOND et al., Constituting the Board of Assessors of the City of New York, Defendants.

THE CITY OF NEW YORK, Appellant.

Streets — New York (city of) — change of grade — when erection of viaduct in and above a street constitutes a change of grade for which an abutting owner may recover damages.

Where a viaduct, built through a street of the city of New York between two points higher than the street, consists of a floor or roadway sixty-three feet in width supported on a double row of columns set ten feet from the curb lines, and from fifty to fifty-eight

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feet above the surface of the street, so that access to the roadway carried by the viaduct is denied to an abutting owner, the erection of such viaduct constitutes a change of grade of the street, for which such owner whose property is injured thereby may recover damages under the provisions of the New York Consolidation Act and Greater New York charter, which make it the duty of the assessors where the established grade north of Sixty-second street of any street "shall be changed or altered in whole or in part," to estimate the damages suffered by abutting owners and to make an award therefor.

People ex rel. Crane v. Ormond, 178 App. Div. 151, affirmed.

(Argued June 12, 1917; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 22, 1917, which sustained a writ of certiorari and annulled a determination of the board of assessors of the city of New York dismissing, for want of jurisdiction, the relator's claim for damages due to a change of grade.

The following questions were certified: "1. Has the board of assessors of the city of New York jurisdiction to make an award to the relator for damages sustained by reason of the construction of the viaduct described in the affidavit for the writ of certiorari herein with respect to the buildings which were, between the years 1889 and 1897, on the premises formerly belonging to the relator's intestate, the late George W. Sauer, as described in said affidavit? 2. Has the board of assessors of the city of New York jurisdiction to make an award to the relator for damages sustained by reason of the construction of the viaduct described in the affidavit for the writ of certiorari herein with respect to the land formerly belonging to the relator's intestate, the late George W. Sauer, and described in said affidavit? 3. Do the facts set forth in paragraph IV of the return to the writ of certiorari herein constitute a defense to the relator's claim? 4. Do the provisions of chapter 512 of the Laws of 1894 con-

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stitute a defense to the relator's claim before the board of assessors?"

The facts, so far as material, are stated in the opinion.

Lamar Hardy, Corporation Counsel (Charles J. Nehrbas and Terence Farley of counsel), for appellant. There has been no change of grade of One Hundred and Fifty-fifth street or of Eighth avenue within the meaning of section 873 of the Consolidation Act and section 951 of the charter of the city of New York. (*Uppington v. City of New York*, 165 N. Y. 222; *Transp. Co. v. Chicago*, 99 U. S. 635; *Atwater v. Trustees of Canandaigua*, 124 N. Y. 602; *People ex rel. City of New York v. Lyon*, 114 App. Div. 583; 186 N. Y. 545; *People ex rel. City of New York v. S. R. Realty Co.*, 149 App. Div. 651; 207 N. Y. 771; *Fuller v. City of Mt. Vernon*, 171 N. Y. 247; *Mayer v. City of New York*, 193 N. Y. 535; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118.)

John M. Harrington and Herbert H. Gibbs for respondent. The erection of the viaduct constituted a change of street grade, for the damage resulting from which a statutory remedy was afforded by the laws in force at the time the viaduct was accepted by the city authorities; the relator's intestate never had his day in court and chapter 516, Laws of 1916, expressly preserves the very remedy invoked by the relator before the board of assessors. Consequently that board had jurisdiction of the relator's claim. (L. 1882, ch. 410, § 873; L. 1852, ch. 52, § 3; *Sauer v. City of New York*, 90 App. Div. 36; 180 N. Y. 27; 206 U. S. 536; *Smith v. Boston & Albany R. R. Co.*, 181 N. Y. 132; *People ex rel. City of New York v. Hennessy*, 157 App. Div. 786; 210 N. Y. 617; *People ex rel. Tytler v. Green*, 64 N. Y. 606; *People ex rel. Heiser v. Gilon*, 121 N. Y. 551.)

ANDREWS, J. In 1886 George W. Sauer became the owner of lots at the corner of West One Hundred and Fifty-fifth street and Eighth avenue in the city of New

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York, and continued to be the owner until 1900. He died in 1905 and the relator became his administratrix.

Before he acquired title One Hundred and Fifty-fifth street and Eighth avenue had both been regulated and graded.

West of Mr. Sauer's property One Hundred and Fifty-fifth street ran to a bluff some seventy feet high. To the east it ran to what is known as the Macomb's Dam Bridge, also considerably above the level of the street.

Chapter 576 of the Laws of 1887 authorized the city to improve and regulate the use of One Hundred and Fifty-fifth street and for that purpose to construct an elevated iron roadway, viaduct or bridge for the passage of animals, persons, vehicles and traffic. Under the authority so conferred work was begun in 1890 and completed and accepted in 1893.

One Hundred and Fifty-fifth street is one hundred feet wide. The viaduct was built through it from the bluff to the bridge. It was sixty-three feet wide and its upper surface was a solid flooring with a paved driveway, and sidewalks upon each side. Where it passed Mr. Sauer's property it was from fifty to fifty-eight feet high. It was supported on a double row of iron columns each a foot and half square, set ten feet from the curb lines and forty-three feet apart east and west. At Eighth avenue a quadrilateral structure was built eighty feet wide, extending down Eighth avenue in front of Mr. Sauer's property some thirty feet. Except for the columns supporting this viaduct the surface of the streets was unchanged.

By section 873 of chapter 410 of the Laws of 1882 (the New York Consolidation Act) it was made the duty of the assessors where the established grade north of Sixty-second street of any street "shall be changed or altered in whole or in part" to estimate the damages suffered by abutting owners and to make an award therefor.

This has never been done with respect to the Sauer property.

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Mr. Sauer did, however, begin two actions against the city. The first was at law for damages. The Appellate Division reversed a judgment in his favor and ordered a new trial, but no further action seems to have been taken. The second was in equity to restrain the city from continuing the viaduct. Here again he was beaten.

Section 951 of chapter 516 of the Laws of 1916 (amending the New York charter) provided that in all cases where a change of grade has been made prior to the taking effect of the act it shall, as to liability for compensation, be governed by the laws in force when the change was completed and accepted; but a claim in writing must be made to the assessors before July 1st, 1916.

Such a claim on behalf of the Sauer property was duly made.

This claim was dismissed by the assessors on the ground that they had no jurisdiction to entertain it. The Appellate Division has annulled this determination and has remitted the claim to the board for its action thereon.

The serious question in the case is whether the structure in One Hundred and Fifty-fifth street changed the grade of the street within the meaning of the acts of 1882 and 1916.

Wholly independent of the authorities upon the subject we are of the opinion that it did. It is true that the original surface of the street was not altered except by the erection of pillars. It is true that pedestrians and vehicles may still pass over it. But practically and substantially One Hundred and Fifty-fifth street as now used passes on a level fifty feet or more above the Sauer property. This is the level adopted by travel east and west. To the street so used access was denied to Mr. Sauer. Necessarily his damage was great. Under such circumstances the court should be slow to adopt a technical construction of a phrase the result of which would be to deprive the relator of any remedy.

We also think that we are concluded upon this question. It is true that in the various cases brought by Mr.

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Sauer the courts of this state have never said definitely that the structure constituted a change of grade. The first reference to the subject is in 44 App. Div. 307. Justice McLAUGHLIN speaking of the viaduct says: It "was something more than a mere change of grade of the street." In the second case Justice LAUGHLIN (90 App. Div. 39) speaks of it as a double roadway above and below. On appeal this court suggested (180 N. Y. 30) that Mr. Sauer might have relief under existing statutes — referring necessarily to grade damages; notwithstanding that Judge BARTLETT in a dissenting opinion had argued that there was no change of grade.

But this second case was appealed to the United States Supreme Court. Upon that appeal (206 U. S. 536) Justice MOODY evidently thought that a change of grade had been effected. He says that the state courts have uniformly held that the erection of such a viaduct "is a legitimate street improvement equivalent to a change of grade; and that, as in the case of a change of grade," the abutting owner is not entitled to compensation. But he also quotes *Willis v. Winona City* (59 Minn. 27), where speaking of a similar structure, the court says that it "in effect amounts merely to raising the grade" of the street; and that it makes "no difference in principle whether this was done by filling up the street solidly or, * * * by supporting the way on stone or iron columns."

Shortly after the *Sauer* case was in this court Judge O'BRIEN refers to it and interprets what we intended to hold. In 181 N. Y. 137, he says that at common law there was no liability for the change of grade of a street. It is sufficient as an authority to refer to the *Sauer* case. "It was held in that case that where the original street was elevated upon columns fifty feet above the original surface that it was a change in the grade of the streets within the meaning of the principle just referred to." Later Justice SCOTT, referring also to the *Sauer* case, says that this viaduct "was held in every

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court to constitute a change of grade" (*People ex rel. City of New York v. Hennessy*, 157 App. Div. 788). This case was affirmed here in 210 N. Y. 617, without opinion, but no criticism was made of this statement.

In view of this history we do not think that additional authority with regard to this particular structure is needed. But if it were the *Hennessy* case supports our conclusion.

Two cases cited by the appellant (*People ex rel. City of New York v. Lyon*, 114 App. Div. 583, and *People ex rel. City of New York v. Sand Rock Realty Company*, 149 App. Div. 651), both of which we affirmed, are not inconsistent with this view. In *People ex rel. City of New York v. Lyon* the structure complained of was not upon the street, but upon land acquired outside its limits. In *People ex rel. City of New York v. Sand Rock Co.* the question was as to the construction of a particular statute. A structure was erected in Willis avenue. If it constituted a change of grade the abutters had no remedy unless they could point to some statute giving it to them. The statute to which they referred did not do so. It allowed damages for change of grade simply to owners upon cross streets, the grade of which might be elevated so as to reach the structure in Willis avenue.

There are various minor claims made by the appellants. We have examined them all and do not find in them any reason for reversing the conclusion of the Appellate Division.

Our holding is that such a structure as was erected in One Hundred and Fifty-fifth street constitutes a change of the grade of the street.

The order of the Appellate Division should be affirmed, with costs. The first and second questions certified to us should be answered in the affirmative; the third and fourth in the negative.

HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDOZO, POUND and CRANE, JJ., concur.

Order affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. THEODORE J. VOGELGESANG, Appellant.

Physicians — practice of medicine without a license — a practitioner who prescribes and uses medicines for which he receives pay, not exempt from procuring a license as one engaged in practicing “the religious tenets” of his church.

A person who has no license to practice medicine, but, claiming to treat patients and cure diseases by means of the religious tenets of the Spiritualistic church, uses liniments and prescribes medicines for internal use, which are compounded and patented by himself, for which he receives pay, is not exempt from the statute (Public Health Law, Cons. Laws, ch. 45, § 173) prohibiting the practice of medicine without a license, as one engaged in “the practice of the religious tenets of any church.” While a healer inculcates the faith of his church as a method of healing he is immune, but when, as in this case, he goes beyond that, puts his spiritual agencies aside and takes up the agencies of the flesh by the use of remedies operating physically, his immunity ceases and a verdict convicting him of the illegal practice of medicine is sustained by the evidence.

People v. Vogelgesang, 173 App. Div. 919, affirmed.

(Argued June 13, 1917; decided July 11, 1917.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 11, 1916, which affirmed a judgment of the Erie County Court affirming a judgment of the City Court of Buffalo rendered upon a verdict convicting the defendant of the crime of practicing medicine without a license.

The facts, so far as material, are stated in the opinion.

Henry W. Killeen for appellant. The trial court committed error in excluding the defendant's substantial defense and in making the whole action hinge on the question of whether or not the defendant had received

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money for his ministrations to Haldeman. (*People v. Cole*, 219 N. Y. 98.)

Guy B. Moore, District Attorney (*Clifford McLaughlin* of counsel), for respondent. The court properly held throughout the trial and properly instructed the jury if they believed from the evidence that the defendant did for money attempt to treat or did treat and prescribe for any human disease, pain, injury or physical condition, it was their duty to find the defendant guilty. (L. 1909, ch. 49, § 160.)

CARDOZO, J. The defendant has been convicted of the illegal practice of medicine. He says he is a spiritualist, and that he has practiced the religious tenets of his church. If that is all that he has done, he has acted within his rights. We think he has done more.

In February, 1915, one Albert Haldeman, then suffering from fatal heart disease, visited the defendant's office. He paid four visits there, and received three visits at his own home. He died the next month. The defendant rubbed his body with a liniment, and gave him medicine for internal use. All this was done for pay. The patient's wife accompanied him to the office. She says the defendant never uttered a word about spiritualism. The defendant, who was a witness, does not assert that he did. A pamphlet, handed by him to his patient, is in evidence. The title on the cover gives the defendant's name, and adds the words: "Specialist in all forms of chronic diseases; strictly confidential; consultation free." Within the covers is a sketch of the defendant's life. We are told that when eleven years old, "he would get herbs and give them to sick people, for he seemed to know what would be good for them." In later years the Erie County Medical Society complained of him, and a fine was imposed. "After that," says the sketch, "he joined the New York State Association of Spiritualists." The sketch

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is followed by many testimonials from patients. All or nearly all acclaim the virtue of his medicines. Not one of them betrays a consciousness that the supposed cure has been wrought through the power of religion. This was the pamphlet by which the defendant accredited himself to Haldeman. One cannot find here the picture of the religious devotee. One can find only the picture of the unlicensed medical practitioner.

The picture is not changed when we read the defendant's testimony. On the stand he characterized himself as a therapeutic and spiritualist healer and dealer in patent medicines. He had patented them himself. He used a liniment, compounded of angle worms, turpentine, sweet oil and benzine. He says that while massaging the patient with this liniment, he indulged in silent prayer. He also prescribed for internal use a medicine compounded of wine, beef tea and citrate of iron. The same medicine was used for every one. He argues that all this must be excused because he had become a member of the Spiritualist church, and had been commissioned by that church as a spiritual healer. Some of the evidence which he offered on that subject was rejected. Enough was received, however, to prove that the church had recognized him as a healer, and that the practice of spiritual healing was a tenet of its faith. It would have been better if part of the rejected evidence had been admitted. But if all that was offered had been admitted, it could not justify the defendant's acts.

The statute prohibits the practice of medicine without a license, but excepts from its prohibition "the practice of the religious tenets of any church" (Public Health Law, § 173; Consol. Laws, ch. 45). We held in *People v. Cole* (219 N. Y. 98) that the exception protected the practitioners of Christian Science, who taught as part of their religion the healing power of mind. Even then we said that there were times when the question of their good faith must be submitted to a jury. But things

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were done by this defendant which no good faith could justify. He combined faith with patent medicine. If he invoked the power of spirit, he did not forget to prescribe his drugs. "It is beyond all question or dispute," said Voltaire, "that magic words and ceremonies are quite capable of most effectually destroying a whole flock of sheep, if the words be accompanied by a sufficient quantity of arsenic" (Morley's Critical Miscellanies, III, p. 17). The law, in its protection of believers, has other cures in mind. The tenets to which it accords freedom, alike of practice and of profession, are not merely the tenets, but the *religious* tenets, of a church. The profession and practice of the religion must be itself the cure. The sufferer's mind must be brought into submission to the infinite mind, and in this must be the healing. The operation of the power of spirit must be, not indirect and remote, but direct and immediate. If that were not so, a body of men who claimed divine inspiration might prescribe drugs and perform surgical operations under cover of the law. While the healer inculcates the faith of the church as a method of healing, he is immune. When he goes beyond that, puts his spiritual agencies aside and takes up the agencies of the flesh, his immunity ceases. He is then competing with physicians on their own ground, using the same instrumentalities, and arrogating to himself the right to pursue the same methods without the same training.

The meaning of the act is made plain when we consider kindred legislation elsewhere. In varying phrases immunity is granted to those who practice their religious tenets, but always in such a form as to confine the exemption to spiritual ministrations. The statutes are collated in the briefs in *People v. Cole (supra)*. Thus, in Maine (Rev. Sts. 1903, ch. 17, § 16; 1895, ch. 170), Massachusetts (R. L. ch. 76, § 9) and Connecticut (Gen. Sts. 1902, § 4514), the exemption is specifically declared to extend to those who practice Christian Science. In New Hampshire,

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(L. 1915, ch. 167, § 17) it is declared to extend to "those who endeavor to prevent or cure disease or suffering by spiritual means or prayer." In Illinois (Hurd Rev. St. 1909, ch. 91, § 11, p. 1474), the act does not apply to "any person who ministers to or treats the sick or suffering by mental or spiritual means without the use of any drug or material remedy." Nearly the same language is used in the statutes of New Jersey (L. 1915, ch. 271, § 9), North Carolina (L. 1903, ch. 697), Colorado (Rev. Sts. 1908, § 6069), Virginia (L. 1912, ch. 237, § 11) and Michigan (L. 1913, ch. 368, § 8). There are like provisions in other states. Through all this legislation there runs a common purpose. The law exacts no license for ministration by prayer or by the power of religion. But one who heals by other agencies must have the training of the expert.

If that is the true view of the meaning of this statute, the defendant on his own confession has violated the law. Errors which otherwise might be important, are thereby rendered harmless. The court charged the jury that the defendant had not the right to practice his religion for pay. There was doubtless error in the ruling (*People v. Cole, supra*). It is impossible, however, that the error should have affected the result, and we disregard it as immaterial (Code Crim. Pr. § 542; *People v. Swersky*, 216 N. Y. 471, 481).

The defendant was justly convicted, and the judgment should be affirmed.

CUDDEBACK, J. (dissenting). I dissent. The City Court sentenced the defendant to imprisonment for six months. I think that when such extreme punishment is inflicted for a minor offense the rules of law in favor of the accused should be somewhat strictly followed.

The prevailing opinion says that the judge of the City Court excluded evidence to show the practice of healing followed by the Spiritualist church which it would have been better to admit, and erroneously told the jury that

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a person has no right to practice his religious tenets for pay. Confessedly the defendant received pay for his services so the latter error left the jury no option but to convict the defendant. I am not inclined to overlook the errors, and I vote to reverse.

HISCOCK, Ch. J., POUND, CRANE and ANDREWS, JJ., concur with CARDOZO, J., and HOGAN, J., concurs in result; CUDDEBACK, J., reads dissenting memorandum.

Judgment affirmed.

FIRST CONSTRUCTION COMPANY OF BROOKLYN, Respondent and Appellant, *v.* THE STATE OF NEW YORK, Appellant and Respondent.

Eminent domain—constitutional law—when act granting lands under water to upland owners invalid because lacking a two-thirds vote—act attempting to ratify and confirm such grants invalid because embracing subjects not expressed in title—when act granting right to fill in lands under water gives an inchoate and vested right of which grantee cannot be deprived without compensation—when part of act giving such rights is valid under Constitution so that part may be upheld although the remainder be rejected as invalid—awards to such upland owners examined and held to be incorrect—basis of award pointed out.

1. A legislative grant without a valuable consideration to an upland owner bordering on public tidewater to fill in and erect docks on lands lying under water in front of him does not convey title in fee to said latter lands. It does, however, give more than a mere license revocable at will. It conveys a vested, inchoate right in the lands to be filled in, which is in the nature of a franchise. If the upland owner exercises his right and fills in the land in question he thereby acquires title to the same as a necessary incident to the enjoyment of the grant. On the other hand, if he fails within a reasonable time or within the time specified to exercise his right the same may be forfeited for non-user.

2. An act attempting to grant such a right or franchise comes within the provision of the Constitution requiring a two-thirds vote.

3. Where prior to 1884 acts had been passed by less than a two-thirds vote granting to an upland owner, without valuable consideration, the right to fill in and erect docks on lands in front of his

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premises, and in the latter year an act was passed by the necessary two-thirds vote which by its title indicated a purpose to confirm the grants attempted to be made by the prior acts, but which in its body not only attempted to confirm the right or franchise granted by said prior acts to fill in and thereby acquire title, but also attempted to convey title in fee to a large portion of the lands in question which had never been filled in, such act violated the provision of the Constitution, which says: "No private or local bill which may be passed by the legislature shall embrace more than one subject and that shall be expressed in the title." The purposes attempted by said latter act, however, are so distinct and separable that the act may be upheld in respect of the provisions indicated by the title confirming the grant of the franchise made by prior acts and thereby eliminating the defect arising from the lack of a two-thirds vote, although it be deemed and held unconstitutional so far as concerns the other purpose to convey the title in fee to lands in respect of which the franchise had not been exercised.

4. In proceedings to acquire compensation for lands appropriated by the state for barge canal purposes, a certain sum per square foot for land lying under water based upon the theory that the claimant is the owner in fee of the premises in question is not the proper measure of the value of a franchise to fill in said lands and thereby acquire title in fee. The value of the land before filling would not necessarily be the same as the value of the land after it had been filled in less the cost of such filling; the cost of the latter might be more or less than the increase in value of the land by reason of such filling in. Moreover, various considerations might be taken into account in fixing the value of a franchise which might not find any place in an estimate of the value of land whereof the claimant held the title in fee.

5. In such proceedings as above, the state may offer as a defense to a demand for damages because of the appropriation by it of land, the claim that the acts under which the claimant asserts its rights are unconstitutional and invalid.

6. By various acts prior to 1884, which lacked the necessary two-thirds votes, the right was in terms granted to plaintiff's predecessor and assignor, who was an upland owner bordering on Gowanus bay, Long Island, to fill in and erect docks upon land under water lying in front of his premises. Only a small portion of the land described was ever filled in. In 1884 an act was passed by the necessary two-thirds vote, which in substance was entitled one to confirm said prior grants. In its body it attempted not only to confirm said prior acts and eliminate the defect arising from

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lack of necessary votes but also to give title in fee to a large portion of the lands in question which had never been filled in and to which, therefore, claimant's predecessor had never acquired any title independent of the lack of necessary votes. Subsequently these lands were appropriated by the state for Barge canal purposes, and a claim was filed by claimant for damages on account of such appropriation amounting to upwards of three millions of dollars. It was held that a grantee acquired title to lands which were filled in under such grants as were made to claimant's predecessor, and also that the act of 1884 cured the defect arising from lack of a two-thirds vote on the passage of the prior acts, and conveyed title to all of the lands in question whether filled in or not, and an award was made at a certain price per square foot on the theory that the claimant by virtue of the confirmatory act of 1884 had become the owner in fee of all the lands described in the original grants, whether filled in or not. *Held*, error; that the prior acts were defective because not passed by a two-thirds vote, and the confirmatory act of 1884 was unconstitutional and ineffective to grant title to lands which had not been filled in, because such purpose was not disclosed in the title of the act, although said act might be held valid and constitutional so far as it confirmed the grant under the earlier acts of a right to fill in and thereby acquire title, and which purpose was disclosed in the title; that this right was a mere franchise and its value was not properly fixed by an award which gave to the claimant damages at so much per square foot on the theory that it was the owner in fee of the lands, instead of the owner of a franchise to fill in said lands and thereby acquire title; that the test of a price per square foot on the theory of ownership in fee was not the proper one by which to measure the value of claimant's franchise, as different considerations might govern in the latter case than in the former one.

7. Various acts of the legislature, including the one of 1884 above referred to, considered and *held*, that it was not the intent of the legislature by the acts granting to claimant's predecessor and assignor the right to fill in the lands in question, to extend said right over the space included within the lines of certain streets opened and established by legislative acts through the area in question, although said streets had never been physically opened or used at the time the act of 1884 was passed.

First Construction Co. v. State of New York, 174 App. Div. 560, modified.

(Argued May 30, 1916; re-argued March 8, 1917; decided July 11, 1917.)

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CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered February 2, 1916, unanimously affirming an award of the Board of Claims.

Because of the retirement before decision of two members of the court who heard the original argument, a re-argument of the appeal was had.

The facts, so far as material, are stated in the opinion.

Egburt E. Woodbury, Attorney-General (Joseph A. Kellogg, Arnold J. Potter and Sanford W. Smith of counsel), for State of New York, appellant and respondent. The several acts under which the claimants assert title do not grant or confer any ownership or interest in the lands under water appropriated, but were enacted only as the exercise of the state's control of the tideway for the purpose of regulating commerce. If they could be construed as conveying title, they would be unconstitutional. (*Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79; *Thousand Island Steamboat Co. v. Visger*, 179 N. Y. 206; *Town of Brookhaven v. Smith*, 188 N. Y. 74; *People v. Mould*, 37 App. Div. 35; *Prosser v. N. P. R. R. Co.*, 152 U. S. 59; *Wetmore v. B. G. L. Co.*, 42 N. Y. 384; *Wetmore v. A. W. L. Co.*, 37 Barb. 70; *Huber v. People*, 49 N. Y. 132; *People v. Supervisors*, 43 N. Y. 10; *People ex rel. Purdy v. Comrs. of Highways*, 54 N. Y. 276; *Astor v. Arcade R. Co.*, 113 N. Y. 93.) Tidal lands and the control of the waters above them are vested in the state as sovereign in trust for the purposes of commerce and navigation, and all grants of such lands are held subject to the paramount rights of the state which cannot be alienated. The state may re-enter upon such lands for the purposes of commerce or navigation without making compensation to the grantee thereof. The liability of the sovereign in any event in such a case is limited to such liability as it voluntarily assumes. (*Coxe v. State*, 144 N. Y. 396; *People v. Vanderbilt*, 26

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N. Y. 287; *People v. N. Y. & S. I. F. Co.*, 68 N. Y. 71; *Mayor, etc., v. Hart*, 95 N. Y. 443; *Dermott v. State*, 99 N. Y. 101; *Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79; *Sage v. Mayor*, 154 N. Y. 61; *Matter of City of New York*, 168 N. Y. 134; *White v. Nassau Trust Co.*, 168 N. Y. 149; *Slingerland v. International Contracting Co.*, 169 N. Y. 60; *Town of Brookhaven v. Smith*, 188 N. Y. 74; *Lewis Blue Point Oyster C. Co. v. Briggs*, 198 N. Y. 287; *Fulton H., L. & P. Co. v. State*, 200 N. Y. 400; *Lehigh Valley R. R. Co. v. Canal Board*, 204 N. Y. 471; *De Lancey v. Hawkins*, 23 App. Div. 8; *People v. Mould*, 37 App. Div. 35.) The entire area included within the street lines within the appropriation, by numerous statutes and proceedings, has been devoted to the public use and burdened with easement access. The fee of these streets is outstanding in the state, the street easement is vested in the city of New York, and no repeal of this public use can be presumed. (*Matter of City of Brooklyn*, 73 N. Y. 179; *Matter of Wells Ave.*, 22 N. Y. S. R. 648; *K. Ice Co. v. F. S. R. R. Co.*, 176 N. Y. 408; *Am. Ice Co. v. City of New York*, 217 N. Y. 402; *Robins D. D. & R. Co. v. City of New York*, 155 App. Div. 258; 213 N. Y. 631.) No grant "in pursuance of section 3 of chapter 702 of the Laws of 1873," ratified and confirmed by chapter 491 of the Laws of 1884, was obtained by the claimant or its predecessors in title because they failed to appropriate the lands under water to the uses of commerce as required by law and the preceding acts. (1 *Farnam on Water & Water Rights*, 223, 224; *Gould on Waters* [3d ed.], 274, 275; *Engs v. Peckham*, 11 R. I. 210; *Aborn v. Smith*, 12 R. I. 370; *B. & H. Steamboat Co. v. Munson*, 117 Mass. 34; *Polhemus v. Bateman*, 60 N. J. L. 163; *M. C. E. Co. v. C. R. R. Co.*, 16 N. J. Eq. 419.)

William N. Dykman for claimant, respondent and appellant. The legislature granted the lands under

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water within the appropriated area to the upland owner in fee. (L. 1873, ch. 702; L. 1875, ch. 398; L. 1884, ch. 391; *Wetmore v. A. & C. Co.*, 37 Barb. 70; 42 N. Y. 384; *Muhlker v. N. Y. & H. R. R. Co.*, 197 U. S. 544; *People ex rel. Cook v. Wood*, 71 N. Y. 371; *People ex rel. Corscadden v. Howe*, 177 N. Y. 499.) The Barge Canal Terminal Act provides that riparian owners shall be paid for land under water to bulkhead line. (L. 1911, ch. 746; *L. V. R. Co. v. Canal Board*, 204 N. Y. 471.) The award should be affirmed though the court conclude that the fee of the lands is in the state. (*Rosch v. N., etc., R. Co.*, 198 N. Y. 385; *Williams v. Mayor*, 105 N. Y. 419; *Bell v. City of New York*, 77 App. Div. 437; *Bedlow v. Stillwell*, 158 N. Y. 292; *Matter of City of New York*, 117 N. Y. 553.) The referee and the Board of Claims erred in excluding lands within the lines of so-called streets. (*Robins, etc., Co. v. City of New York*, 155 App. Div. 258; 213 N. Y. 631; *Raynor v. Syracuse University*, 35 Misc. Rep. 83; *Woodruff v. Paddock*, 56 Hun, 288; 130 N. Y. 618; *Ludlow v. Oswego*, 25 Hun, 260; *Buffalo v. Hoffeld*, 6 Misc. Rep. 197; *People ex rel. Yonkers v. N. Y. C. & H. R. R. Co.*, 69 Hun, 166.) The act of 1873 grants the lands under water to the upland owners. (*Wetmore v. A. W. L. Co.*, 37 Barb. 70; 42 N. Y. 384; *People v. Vanderbilt*, 26 N. Y. 287; *Ferguson v. Ross*, 126 N. Y. 459; *Towle v. Remsen*, 70 N. Y. 303; *Stuart v. Laird*, 1 Cranch [U. S.], 299; *Opinion of the Justices*, 3 Pick. 517; *Atty.-Gen. v. Bank, etc.*, 5 Ired. 71; *Kenison v. Hill*, 1 La. 469; *Packard v. Rutland*, 17 Mass. 132; *Morrison v. Barksdale*, Harp. 101; *Troup v. Haight*, Hopk. 268; *Jackson v. Gumeer*, 2 Cow. 567; *Smith v. Jersey*, 2 Brod. & Bing. 506.) The act of 1884 is valid, so far as it ratifies and confirms Mr. Beard's title to the lands under water granted or attempted to be granted by the act of 1873. (*People ex rel. Rochester v. Briggs*, 50 N. Y. 553; *Matter of N. Y. & L. I. Bridge*, 148 N. Y.

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540; *Bohmer v. Haffen*, 161 N. Y. 390; *Matter of Sackett, etc., Street*, 74 N. Y. 95.) The grants to the board were not revocable. (*Matter of L. S., etc., Co.*, 212 N. Y. 1; *N. Y. El. L. Co. v. E. L. Subway Co.*, 201 N. Y. 321; 235 U. S. 179.) The grants to Mr. Beard and his associates—claimant's predecessors in title—were not revoked. (*Rasch v. Nassau, etc., R. Co.*, 198 N. Y. 385; *Mayne v. Nassau, etc., R. Co.*, 151 App. Div. 75; 210 N. Y. 607; *L., etc., R. R. Co. v. Canal Board*, 146 App. Div. 160; 204 N. Y. 471; *C. I., etc., R. Co. v. Kennedy*, 15 App. Div. 588; *S. R. T. Co. v. City of New York*, 128 N. Y. 510.)

Charles E. Hughes for Title Guarantee and Trust Company, intervening. The claimant's predecessor held title in fee to the lands appropriated, assuming that the legislature had power to grant such title. (*People v. Canal Appraisers*, 33 N. Y. 461; *Wetmore v. A. W. L. Co.*, 37 Barb. 70; *Williams v. Mayor, etc.*, 105 N. Y. 419; *Towle v. Remsen*, 70 N. Y. 303; *N. Y. El. Lines Co. v. E. C. Subway Co.*, 235 U. S. 179; 218 N. Y. 417; *Archibald v. N. Y. C. & H. R. R. Co.*, 157 N. Y. 574; *Spokane & B. C. R. Co. v. Washington, etc., R. Co.*, 219 U. S. 166; *United States v. Tenn. & Coosa R. Co.*, 176 U. S. 242; *Abbott v. Curran*, 98 N. Y. 665; *People v. S. P. Co.*, 218 N. Y. 459.) If the act of 1873 be deemed to be invalid, still the legislature had abundant power to pass by a two-thirds vote a curative act which would leave no doubt as to the legislative intent. (*Matter of N. Y. El. R. R. Co.*, 70 N. Y. 327; *Sweet v. City of Syracuse*, 129 N. Y. 316; *State ex rel. Allison v. Corker*, 67 N. J. L. 596; *People ex rel. Olin v. Hennessy*, 206 N. Y. 38; *People ex rel. Callahan v. Board*, 174 N. Y. 169; *United States v. Freeman*, 3 How. [U. S.] 556; *Cope v. Cope*, 137 U. S. 682; *People ex rel. City of Rochester v. Briggs*, 50 N. Y. 553; *Willis v. City of Rochester*, 219 N. Y. 427; *Matter of Dept. of Public Parks*, 86 N. Y. 437.)

HISCOCK, Ch. J. By proper proceedings the state appropriated for Barge canal purposes a considerable tract of land situate at the border of and within Gowanus bay, Long Island. The claimant as grantee and assignee of the estate of one Beard asserting its ownership of 1,744,274.51 square feet of the land appropriated and of the crib and pile pier located thereon, filed a claim for upwards of \$3,000,000 for the lands appropriated and consequential damages to adjacent lands not appropriated. The lands asserted by the claimant to belong to it and which were thus appropriated included a small strip of upland and a small amount of land originally under water and which had been filled in, but for the most part consisted of lands which are described as "salt meadows, drained marsh and mud flats which were partially submerged at high tides," and which land "is under water and consequently within the tideway" of Gowanus bay.

By stipulation of the state and the claimant, all questions of law involved in said claim and expressly including the question of title to the land were referred to Albert Haight, former judge of this court, and official referee, with the provision that after the determination by him of said questions, if in favor of claimant, the trial of the issue of the amount of damages should proceed before the Board of Claims. After a long and careful trial the referee made a decision with findings of fact and conclusions of law to the effect that said claimant was the owner in fee of 1,422,022 square feet of the lands appropriated under and by virtue of grants contained in certain acts of the legislature, and was entitled to be compensated for said land, but was not entitled to any consequential damages. The Board of Claims adopted the findings and conclusions thus made and reached by the referee, made additional ones, and awarded the sum of seventy-five cents per square foot as compensation for the land which was thus found to have been taken from the claimant.

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There will be considered first the theory under which this has been done, and then the later theory by which it is now sought to uphold what has been thus done.

From the findings it appears that comparatively early in the history of Brooklyn William Beard was an upland owner whose lands bordered on Gowanus bay, in the locality involved in this proceeding. From time to time prior to the passage by the legislature of three acts which the referee substantially finds gave to the claimant's assignor title to the lands for which compensation has been awarded, and which will hereafter be referred to at length, various acts were passed which either established bulkhead and pier lines extending in front of the Beard lands, or authorized Beard and others to build and maintain sea walls, piers, docks, wharves, etc., and to fill in the lands lying under water in front of their uplands within the bulkhead and pier lines thus established. It does not seem necessary at this point to quote or refer at length to all of these statutes. It may be stated generally that none of them did more than grant to Beard and others the privilege to build wharves, etc., and fill in lands; none of them purported in terms to grant and convey the title to lands under water included within the area now appropriated and none of them was passed by a two-thirds vote.

On the original argument much emphasis was placed by the attorney-general upon certain language contained in one of these acts as supplying the basis for a reversal of the views which have been adopted by the courts below and the judgment which has been founded thereon.

This act was chapter 856 of the Laws of 1866, and was entitled "An Act to authorize William Beard and others to erect, construct, build and maintain * * * docks, wharves, bulkheads, piers, and warehouses and a basin for commercial uses in front of their lands in the twelfth ward of the city of Brooklyn." It authorized said beneficiaries to do the things mentioned in the title of said act

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and to fill in lands under water in front of their upland within the bulkhead and pier lines established in front of said premises. This permission covered all or part of the appropriated premises and it is the final section of the act upon which the attorney-general placed importance. This section provides: "This act shall not take effect until the consent of the commissioners of the land office shall first be obtained to use the privileges intended to be granted by this act," and the attorney-general argued that because of this last provision, it was not the intent of the state that any grant to claimant's predecessor should be effective unless made or approved by the land commissioners and which approval at the time of the original argument did not appear to have been given. On the re-argument, however, there was produced and filed without objection a certified copy of an instrument appearing to give the prescribed consent.

Then we come to the three acts which have been deemed to be decisive ones in the determination of the case, and for the better understanding of which it is necessary to state a few introductory and closely related facts.

Prior to June 10, 1873, a board of officers had been appointed by the president to examine into and revise the exterior and bulkhead lines of the harbor of New York on the Brooklyn side in pursuance of a concurrent resolution adopted by the senate and assembly, and said board had made a report recommending the location and course of such a pier line. Said board apparently had stated in said report that it had the requisite data for determining the pier line in Gowanus bay in front of the premises in question but deemed it advisable to postpone its recommendation of that portion of the line to a future report.

June 10, 1873 (L. 1873, ch. 702), the legislature adopted the first of the acts in question entitled "An act to establish bulkheads and pier lines adjacent to the shores of the port of New York in the county of Kings." Said act

declared the pier line so far as recommended by the above board to be the lawful pier line for that portion of the shore, and, what is especially important, it provided that it should be "lawful for the owners of real estate fronting on the water between * * * Hamilton Ferry, in the city of Brooklyn, and Bay Ridge avenue, in the town of New Utrecht, [and which included that portion of the shore here involved] to construct and maintain bulkheads, or wharves and piers * * * ; and to fill in the same on the lands under water in front of their lands to the exterior bulkhead and pier lines so to be recommended [thereby referring to the bulkhead and pier lines to be recommended by said board of officers in its future report], subject, nevertheless, to the action of the legislature at its next session." This act was not passed by a two-thirds vote.

The legislature at its next session did not take any action pertaining to this subject, but at its session in 1875 it passed the second of these acts (L. 1875, ch. 398) entitled "An act to amend an act entitled 'An act to authorize William Beard and others to erect, construct, build and maintain sea-walls or break-water piers, docks, wharves, bulkheads, piers and warehouses, and a basin for commercial use in front of their lands in the twelfth ward of the city of Brooklyn,' passed April twenty-fourth, eighteen hundred and sixty-two, and also to amend an act bearing the same title, passed April thirtieth, eighteen hundred and sixty-six."

This act after reciting that the board of officers appointed to examine into and revise the exterior and bulkhead lines of the harbor of New York on the Brooklyn side, in pursuance of the concurrent resolution of the senate and assembly passed April 6, 1872, recommended the modification of the lines and spaces of the Erie basin and the Brooklyn basin in accordance with the changes shown on a map annexed to said report and

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that William Beard and others, owners of the water front and lands adjacent to said basins were desirous of carrying out the changes and modifications recommended in said report, proceeded to fix the "pier, bulk-head and other lines adjacent to the shores of the Brooklyn side of the port of New York" between certain points, and the act stated that the new lines established were shown on a map entitled "map showing plan for the improvement of the water front and adjacent lands in the twelfth ward of the city of Brooklyn, New York, owned by William Beard * * * and others, dated March first, one thousand eight hundred and seventy-five, Leander N. Vibbard, city surveyor." This was the second one of the three acts found by the referee to be of controlling importance in granting to claimant the rights claimed by it, but it was not passed by a two-thirds vote.

The learned referee in effect found as matter of fact that this act fixed new bulkhead lines extending in front of the premises owned by Beard and others and outside of the lands appropriated. He found "The map made by Leander N. Vibbard, City Surveyor, dated March 1, 1875, correctly shows the pier and bulkhead lines established by Chapter 398 of the Laws of 1875, and was made the official map of said lines by said act. The Newton Map * * * referred to in Chapter 491 of the Laws of 1884, shows the exterior boundary line of the property then owned by the claimant's predecessor in title to be the same as that shown on the map of Leander N. Vibbard * * * and as laid down by Chapter 398 of the Laws of 1875. * * *." There is considerable controversy in respect of this so-called finding of fact which does not seem to be especially material in the light of the views which I take concerning the case. It seems evident that so much of said finding as states that the Newton map "shows the exterior boundary line of the property then owned by the claimant's predecessor in title" is a conclusion of law rather than a finding of

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fact, and outside of the identification of certain lines which is accomplished by this finding, I think it is largely controlled by other findings and conclusions of law which were adopted by the referee.

Then, of importance in connection with the third and last of said three acts and next to be considered, the referee found as a matter of fact: "The lands surrounding that appropriated by the State has in recent years been filled in by claimant's predecessor in title up to a level with the surrounding country and the city grade of streets, six or eight feet above mean high water. The filling also extends across the corner of the lands appropriated outside of that which was formerly high land. *All of the rest of the land appropriated is under water and consequently within the tideway.*"

The remaining act now in mind is chapter 491 of the Laws of 1884, and is the one of the three acts which the referee found finally gave and granted to claimant's predecessor the right in and to lands on Gowanus bay for which the award has been made. The title of said act is of much importance. It is "An Act to ratify and confirm certain grants made in pursuance of section three of chapter seven hundred and two of the laws of eighteen hundred and seventy-three," and which was the act and section already referred to giving to Beard and others the right to construct docks and fill in land in front of their premises in the locality in question. This act of 1884, unlike all of the preceding ones, was passed by a two-thirds vote, and it is of such culminating importance that it seems proper to quote it in full.

It reads: "Section 1. The map filed in the office of the secretary of state on the fourth day of March, eighteen hundred and eighty-four, entitled 'chart of pier and bulk-head lines of Gowanus bay, New York harbor, as recommended by the special board of eighteen hundred and seventy-five,' and certified by John Newton, colonel of engineers, brevet major-general, to be a full, true and

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correct copy of a map made by the commissioners appointed under concurrent resolutions relative to the pier and bulk-head lines in the harbor of New York, passed in Senate February seventeen, eighteen hundred and seventy-two, and in Assembly April six, eighteen hundred and seventy-two, and presented by the said commissioners to the governor, pursuant to section three of chapter seven hundred and two of the session laws of eighteen hundred and seventy-three, recommending certain pier and bulk-head lines in Gowanus Bay, and the copy of the report of said commissioners, certified by said John Newton, colonel of engineers, to be a full and correct copy of the original report presented to the governor, together with said map, shall be held in all courts and before all tribunals to be sufficient evidence of the contents and effect of the original map and report made by said commissioners, and shall be of the same force and effect as said original map and report, and all grants of land under water within or to the exterior boundary line appearing upon said map and report made by the state, are hereby made to extend by the same course and direction to such exterior boundary line, and are hereby ratified and confirmed as thus extending to the grantees thereof, and their assigns in fee simple."

Upon the facts and legislation which have now been referred to, and other facts of a formal nature, which it is not necessary to refer to at length, the referee adopted certain conclusions of law which have been made the basis of the judgment in favor of the claimant, and which are as follows:

"I. The lands appropriated by the State in these proceedings with the exception of the highlands running across the corner described in No. VII of the Findings of Fact, being covered by the tideway, originally belonged to the State.

"II. The provisions of the statute to the effect that it shall be lawful for William Beard and others, owners of

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real estate fronting upon the waters of the bay, their heirs, and assigns, to erect, construct, build and maintain a sea-wall or breakwater pier, docks, wharves, bulkheads, piers and warehouses and a basin for commercial purposes on the lands under water in front of their premises and to fill in the same, is not a grant of a fee to such land; but is a permit by which, in so far as such owners of uplands have under the authority of the statute entered upon and improved the same by filling in, or the construction of piers, docks, wharves, bulkheads, etc., they have acquired a property right in the premises which, under the circumstances of this case, they could not be deprived of without compensation.

"III. The claimant's predecessor in title having acquired rights to lands under water by reason of the filling in of the same as appears from the eighth finding of fact herein and referred to in the above second conclusion of law, such rights were by virtue of Chapter 491 of the Laws of 1884 changed into an estate in fee simple and such estates of such owners were by virtue of such statute extended over the lands under water from such filled in lands to the exterior boundary of the new bulkhead line established by the Act of 1875. The provisions of this Act, however, were not intended to cover the lands set apart for the Henry Street basin nor the Hicks Street basin, neither was it intended to include the fee of Henry Street or Columbia Street as laid out and opened by Section 2, Chapter 327, of the Laws of 1876."

The final conclusion quite completely summarizes the theory upon which the award was made.

For the purposes of discussion at this point it seems to be unnecessary to determine what were the exact nature and extent of the privilege which was granted by the act of 1873, and perhaps by other acts, to claimant's predecessor to erect docks and wharves on, and fill in the submerged land included within the area appropriated by the state. That question will be considered hereafter.

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These acts did not in terms exact any consideration for the privilege thereby granted and if this privilege amounted to an exclusive and valuable right and interest to, over or in said submerged land which could only be taken away on payment of compensation, then certainly said acts come within that provision of the Constitution which ordains that "The assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes," (Art. 3, section 20) and said acts were not passed by such vote.

It is barely suggested by claimant that within the doctrine of *Wetmore v. Brooklyn Gas Light Co.* (42 N. Y. 384) this lack of a constitutional two-thirds vote for these bills cannot be urged as a defense to this claim, but we think that proposition if seriously urged could not be sustained. The *Wetmore* case presented the question in an entirely different form than that in which it now arises. There a stranger was urging that certain grants by the state to another which he was attempting to violate or disregard were unconstitutional and it was said by the court under the circumstances of that case that that was a proposition to be urged by the state if anybody and that the stranger had no interest in it. Here it seems to be very plain that in an attempt by a claimant to make the state pay for rights in real property claimed to have been obtained from it, the state may answer that the acts of its legislature were unconstitutional and that thereby no such right or interest ever passed as that for which compensation is sought from it.

Therefore, the ultimate support of claimant's claim of title to these premises and of its right to compensation therefor must be sought in the act of 1884 already quoted, and this was fully recognized by the learned referee in giving to it the effect he did. In my opinion, however, it will be found that various obstacles, constitutional and others, prevent the act from accomplishing

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the results which were credited to it by him and by the courts below.

The title of this act described it as one "to ratify and confirm *certain grants* made in pursuance of section three of chapter seven hundred and two of the laws of eighteen hundred and seventy-three." The body of said act provides "*all grants of land under water* within or to the exterior boundary line appearing upon said map and report made by the state [referred to in preceding lines of the act and being the line established by said act of 1875] are hereby made to extend by the same course and direction to such exterior boundary line, and are hereby ratified and confirmed as thus extending to the grantees thereof, and their assigns in *fee simple*." The language of this act, whether in its title or its body, is not entirely accurate and apt when the attempt is made to apply it to the facts found in this proceeding, for the purpose of carrying out claimant's theory. In the plainest meaning of language no "grants" appear to have been made to claimant's predecessor "in pursuance of" section three of chapter seven hundred and two as stated in the title of said act and no "grants of land under water" were made as specified in the body of the act. But we shall accept at this point for purposes of discussion the theory which was adopted by the learned referee. As has already been stated, he held that the original act of 1873 did not grant or convey any lands under water but merely bestowed upon claimant's predecessor the privilege to build docks, etc., and to fill in lands and that when this privilege had been exercised the parties exercising it for the first time acquired rights which were in the nature of a grant, of which they could not be deprived without compensation and which might be regarded as described in and coming within the *confirmatory* provisions of the act of 1884.

Accepting this interpretation, however, we then encounter further and even more serious difficulties.

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Assuming that the act of 1884 by the use of the terms "grants of land under water" was intended to refer to lands which had been filled in or docks or piers which had been erected, and to confirm and ratify grants acquired by that process, manifestly it would only refer to and confirm grants in that manner secured by filling in land by construction prior to the passage of the act in 1884. By its terms it did not and could not very well refer to and confirm grants of lands arising through what was done in the future. There is nothing in the findings of fact which fairly indicates that any of said lands had been filled in before the act of 1884 was passed. The only finding on this subject is that certain lands had been filled in "in recent years" and which expression would hardly carry back of the period of thirty years which had elapsed between the date when the act was passed and the findings made. So much for the confirmatory features of the act.

We now pass to the consideration of other difficulties with this act. As has been noted, its title stated that it was an act "to ratify and confirm certain grants" made in pursuance of a certain act. The only theory on which the courts below have held that there were any "grants" which came within the terms of this title and of the body of the act so as to be the subject of confirmation within its provisions is the one already referred to that by filling in lands under the permission granted by the act of 1873 and other acts upland owners "obtained a property therein in the nature of a grant" which the legislature had the right by said act of 1884 to recognize and protect.

Assuming at this point that all filling of the lands in question had been done prior to the passage of the act of 1884, and that, therefore, all of the lands thus filled in became the subject of a grant which was subject to confirmation by the terms of said act, it nevertheless has been found that the lands so filled in constituted a very small portion of the area lying between the uplands of

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claimant's predecessor and the bulkhead and pier lines established by the act of 1875, and of the appropriated area. The finding of fact which especially covers this subject reads as follows:

"VIII. The lands surrounding that appropriated by the State has in recent years been filled in by claimant's predecessor in title up to a level with the surrounding country and the city grade of streets, six or eight feet above mean high water. The filling also extends across the corner of the lands appropriated outside of that which was formerly high land. All of the rest of the land appropriated is under water and consequently within the tideway."

Claimant's title to the balance and great portion of the area for which it has received compensation must, therefore, rest on the other provisions of said act of 1884, wherein it is provided that "all grants of land under water within or to the exterior boundary line appearing upon said map and report made by the State, are hereby made to extend by the same course and direction to such exterior boundary line, and are hereby ratified and confirmed as thus extending to the grantees thereof and their assigns in fee simple."

Disregarding the singular inappropriateness of an act which purports to ratify and confirm something which by it is being done for the first time, we have it that on claimant's theory as sustained thus far by the courts, this act by calling it an "extension" in fact attempted to grant to claimant's predecessor for the first time the title to all of the unfilled land lying between the portions which had been filled in and which for that reason have been regarded as coming within the term "grants" and subject to confirmation, and the exterior lines then recently established, and which constitutes the bulk of the lands for which compensation has been awarded. The act thus not only confirms what the courts below have decided to regard as grants, but conveys title to a new lot of land

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many times the size of that whereof title was confirmed, and which latter and original grant was not in any manner referred to in the title of the act.

It seems to me that because of these circumstances the act was obviously a private one and clearly and flagrantly violates that provision of the Constitution (Article 3, section 16) which says: "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

A member of the legislature who examined the title of this act and who was conversant with the facts would have been led to believe on the theory most favorable to claimant's predecessor, that this act was intended to give him title in fee to lands under water which had been filled in at his expense and might very well say that that was a fair thing to do. Such a member never would have been led to suspect by the title of the act that it was the intent in addition to grant the title in fee to a very much larger tract of land which the beneficiaries had never improved, and which under the grant then being attempted they might hold without improvement indefinitely until some opportune time should arrive for asserting their title. As I have said, I think that such an act clearly violates the Constitution. (*Economic Power & C. Co., v. City of Buffalo*, 195 N. Y. 286.)

So it results that the theory under which the award was made and has been upheld is faulty because prior acts giving the privilege to fill in were not adopted by the necessary votes, and the act of 1884 attempting to eliminate this difficulty and give title to lands whereof what was in the nature of a grant had been obtained by filling in (save for lack of necessary votes), violated the Constitution by attempting also to give a fee to a large amount of land which had not been filled in, and which latter purpose was not at all disclosed in the title.

Apparently these or other defects in the theory thus far adopted to uphold this claim have impressed themselves

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upon the judgment of claimant's counsel, for upon the reargument it was largely abandoned and a new one adopted. This later theory is that under the terms of the various acts which have been referred to, and independent of any supplemental process of filling in, claimant's predecessor acquired title in fee to the lands appropriated. Of course if this theory is sound it eliminates the difficulties which have been pointed out springing from the necessity of filling in the lands in order to establish a grant and perfect title to all of the appropriated area under the provisions of the act of 1884. We do not think, however, that this theory can be sustained.

Independent of the constitutional objection that they were not passed by a two-thirds vote, the acts prior to the one of 1884 did not by their terms purport to grant and convey the lands under water. They simply granted a privilege of filling in or erecting improvements upon those lands. We may assume that as a necessary incident to this privilege it was implied that when the privilege had been exercised and the lands filled in the beneficiary of the grant would become the owner thereof. This implication was necessary in order to secure the enjoyment and fruits of the privilege which was granted, and this is the view which was correctly adopted by the learned referee. (See, also, *Williams v. Mayor, etc., of N. Y.*, 105 N. Y. 419.)

But no controlling authority has been called to our attention which fairly holds that the grant of a mere privilege to fill in tidewater lands, so long as unexercised, conveys title. The case of *O'Donnell v. Kelsey* (10 N. Y. 412), which has been cited by counsel for the claimant as establishing a contrary doctrine, does not do so. That case involved the interpretation of certain acts authorizing riparian owners to dock out into tidewater, and it seems to have been assumed that they thereby acquired title to the lands under water. The controversy, however, was entirely between adjoining owners over the

location of boundary lines, and in which controversy there was no motive to question or depreciate the extent of the grants which had been made to them by the state, and the questions here being discussed were not raised or considered.

Reaching the conclusion that these prior acts did not convey title to the lands under water unless filled in it becomes necessary for certain purposes to determine what were the extent and nature of the right granted before it had been exercised. This precise question does not appear to have been definitely settled in this state. In various states it has been held that all that is granted by such an act is a mere license, revocable by the state at will and without payment of compensation. (*N. Y., L. E. & W. R. R. Co. v. Yard*, 43 N. J. L. 632, 636; *State v. Mayor*, 25 N. J. L. 525; *Stevens v. Paterson & Newark R. R. Co.*, 34 N. J. L. 532; *People v. Cal. Fish Co.*, 166 Cal. 576.)

I think, however, that the privilege amounts to more than this, and that an act granting the right to fill in lands under water, and thereby acquire title to the same, gives an inchoate, vested interest in the lands described which is a property right and of which, unless forfeited or lost in some way, the grantee cannot be deprived without compensation. This view is supported in various ways.

In the first place the rights which a grantee named in such an act acquires thereunder are quite analogous to those which a riparian owner upon public waters enjoys. In the latter case we hold under principles of common law that the riparian owner has certain rights in and over the foreshore of which he cannot be deprived without compensation. (*Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79.) In the present case the legislature by grant gave certain rights and privileges in and over the lands under water, and it would seem as though these also should be protected against destruction without compensation.

In the second place I think the preponderance of author-

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ity in other jurisdictions is in favor of this view, and that indirectly it is sustained by what has been said in some of our own decisions. (*Hodson v. Nelson*, 122 Md. 330; *Bradshaw v. Duluth I. M. Co.*, 52 Minn. 59; *City of Boston v. Lecraw*, 17 How. [U. S.] 426, 433; *Fitchburg R. R. Co. v. Boston & Me. R. R.*, 3 Cush. 58; *Yates v. Milwaukee*, 10 Wall. [U. S.] 497; *Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79; *Bradford v. McQuesten*, 182 Mass. 80; *Hamlin v. Fairpoint Mfg. Co.*, 141 Mass. 51; *Norfolk City v. Cooke*, 27 Grat. [Va.] 430; *Clement v. Burns*, 43 N. H. 609; *Hanford v. St. P. & Duluth R. R. Co.*, 43 Minn. 104; *Miller v. Mendenhall*, 43 Minn. 95; *Lockwood v. N. Y. & N. H. R. R. Co.*, 37 Conn. 387.)

It, perhaps, is unnecessary to give a specific name to this right, but if we are to do this, it may as aptly be termed a franchise as anything else. (*Trustees of Southampton v. Jessup*, 162 N. Y. 122.) I think it possesses the nature of a franchise in one respect which may be of importance in this case. The only motive in the nature of a consideration for the grants which were made to claimant's predecessor was the one that he would exercise the privilege which was granted and by filling in the lands and erecting docks contribute to the commercial resources and facilities of the city of Brooklyn and save the state the expenses and uncertainties which it might incur if it embarked on this undertaking. (*Williams v. Mayor, etc., of N. Y.*, 105 N. Y. 419, 436.) This, I have no doubt, was a necessarily implied condition of the grants and for a failure to comply therewith they could have been forfeited by the state. This principle, as applicable to the present situation, can be no better stated than was done in respect of a franchise in *New York Electric Lines Co. v. Empire City Subway Co.* (235 U. S. 179, 193, etc.) and where it was said: "Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or

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impliedly assumed to carry on the undertaking to which they relate. (See *The Binghamton Bridge*, 3 Wall. 51, 74; *Pearsall v. Great Northern Railway Co.*, 161 U. S. 646, 663, 667.) They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance. The case of *Capital City Light & Fuel Company v. Tallahassee* (186 U. S. 401), to which the defendant in error refers, is not opposed. There the complainant, upon the ground of an exclusive privilege, sought to enjoin a municipality from operating its own electric light plant; although ten years had elapsed since the complainant's grant, the complainant had done nothing whatever to establish an electric light business and under the express terms of the statute the exclusive privilege had not attached. (186 U. S. 410.)

"But, while the grant becomes effective when made and accepted in accordance with the statute and the grantees is thus protected in starting the enterprise, it has always been recognized that, as the franchise is given in order that it may be exercised for the public benefit, the failure to exercise it as contemplated is ground for revocation or withdrawal. In the cases where the right of revocation in the absence of express condition has been denied, it will be found that there has been performance at least to some substantial extent or that the grantees is duly proceeding to perform. And when it is said that there is vested an *indefeasible* interest, easement, or contract right, it is plainly meant to refer to a franchise not only granted but exercised in conformity with the grant. (See cases cited *supra*.) It is a tacit condition annexed to grants of franchises that they may be lost by misuser or non-user. (*Terrett v. Taylor*, 9 Cranch, 43, 51; *Chicago Life Insurance Co. v. Needles*, 113 U. S. 574, 580; *Given v. Wright*, 117 U. S. 648, 656.) The condition thus implied is, of course, a condi-

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tion subsequent. The same principle is applicable when a municipality under legislative authority gives the permission which brings the franchise into being; there is necessarily implied the condition of user. The conception of the permission as giving rise to a right of property in no way involves the notion that the exercise of the franchise may be held in abeyance for an indefinite time, and that the right may thus be treated as a permanent lien upon the public streets, to be enforced for the advantage of the owner at any time, however distant. Although the franchise is property, ‘it is subject to defeasance or forfeiture by failure to exercise it (*People v. Broadway R. R. Co. of Brooklyn*, 126 N. Y. 29), or by subsequent abandonment after it has been exercised (*People v. Albany & Vermont R. R. Co.*, 24 N. Y. 261).’ If ‘no time is prescribed, the franchise must be exercised within a reasonable time.’ (*City of New York v. Bryan*, 196 N. Y. 158, 164.)”

With the expression of these views in respect of the prior acts and of the situation thereunder of claimant’s predecessor we come now to the consideration of the statute of 1884, and which it seems necessary, although at the risk of some repetition, to discuss briefly again for the purpose of determining its proper position and effect in the chain of statutes relied on by the claimant on its present theory.

Its title as of an act “to ratify and confirm certain grants made in pursuance of section three of chapter seven hundred and two of the laws of eighteen hundred and seventy-three” while somewhat inapt, can, we think, be applied to grants of the privilege to fill in made to claimant’s predecessor “in pursuance of,” that is under or by virtue of, the terms of section 3 of the act of 1873. The term “grants” was not inappropriate to describe the gift or conveyance by the state of such a privilege as we hold that given to claimant’s predecessor was, and the reference to the particular statute and section thereof

whereby these "grants" were made helps to identify the subject referred to. The words used in the body of the act describing the privileges as "grants of said lands under water" were less appropriate. Nevertheless these words connected in interpretation with those used in the title and specifically referring to section 3, chapter 702, Laws of 1873, identified the rights which it was intended to confirm, and I do not think this intention should be frustrated because language somewhat inapt to the intent mentioned has been used.

The more serious difficulty with the act is of course the one already referred to, that in the body it transgresses the constitutional prohibition by dealing with more than one subject and with matters not disclosed in the title. Keeping it in mind that prior acts had simply given a privilege or franchise to fill in lands this act purports to accomplish three separate purposes. It purports to extend the area covered by prior acts to the newly-established bulkhead line. It attempts to amplify what we have held to be a privilege or right or franchise into an estate in fee. It then, except for this extension and amplification, does what was fairly disclosed in the title — ratifies and confirms prior grants.

It is said that as a matter of fact the act did not operate to extend the area of land already covered by prior acts. That can more clearly be determined upon another hearing. If it did have that effect it was a violation of the Constitution, which required the object of the statute to be stated in its title. It certainly was in conflict with the Constitution in attempting to enlarge the grant of a mere right or privilege not theretofore exercised, although property, into a title in fee. I think, however, that the constitutional and unconstitutional provisions of the statute are so independent and separable that the statute may be upheld in respect of the former, although condemned so far as concerns the latter purposes. That general subject of upholding separable constitutional provisions of a

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statute when other unconstitutional provisions must fall has been recently considered by this court, and within principles there approved it seems to me that it may be said that this statute may be allowed to operate to the extent of confirming the grants previously made and thereby eliminating the defect of lack of the necessary votes, even though it is unconstitutional in respect of the other purposes to enlarge those rights. (*Dollar Company v. Canadian C. & F. Co.*, 220 N. Y. 270.)

These views will lead to a reversal of the award which has been made and to a new hearing. The question of value has not been determined under rules which we regard as properly applicable to whatever rights the claimant enjoyed. An award at so much a square foot has been made for the area which has been filled in and for that which has not been filled in on the theory that the claimant owned the fee. This was clearly incorrect. The value of a franchise to acquire title to land by filling in will not necessarily be the same as the value of the fee before the land has been filled in. The value of the right in this respect will be the value of the land when filled in less the cost of filling and the addition of value as the result of filling in may be greater or less than the cost of the latter operation. In addition, there may be other features which will differentiate the value of a fee and the value of a right to acquire a fee which is subject to continuing conditions and continuing obligations.

For instance, the liability to forfeiture of claimant's rights for non-user has been somewhat discussed by counsel and considered by us. If it should appear on the new hearing which is necessary that at the time of the appropriation by the state claimant's franchise had become subject to forfeiture or to a *bona fide* serious claim of forfeiture, this might be claimed to be an element to be considered in fixing its market value in these proceedings. While we have deemed it necessary in determining the character of claimant's rights to indicate

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our views in respect of a liability to forfeiture for non-user, we shall not express any opinion upon the question whether the findings indicate a liability to forfeiture at the time of the appropriation or whether liability to such forfeiture or to a serious claim thereof, if established, could properly be considered in these proceedings in fixing values. Those questions were not tried or considered in the courts below, at least under any such theory as we are holding to be applicable to claimant's position and we deem it more just to withhold our consideration of them, if necessary at all, until such consideration has been had.

There may be still other conditions which would be a proper subject of consideration in fixing values upon the theory which we have adopted. We are not attempting to foresee and make a full and complete statement of every one of these. We are simply stating some of them to sustain the proposition that there must be a new hearing of the claim.

We think that the appeal of the claimant from so much of the decision as refuses to make any allowance on account of the land included within the lines of Henry street and of Columbia street is without foundation and that the determination should be upheld. The lines of these proposed streets run through the appropriated area to the bulkhead line, and the portions of them in question consist of lands under water. These lines, so far as material here, were fixed by chapter 327 of the Laws of 1876. Said statute after providing for the lines and continuation thereof to the bulkhead line provided in the case of each street: "Said last mentioned street is hereby opened and established." Because portions of said street included in the appropriated area have never been filled in, improved or traveled the claimant insists that its predecessor and it have acquired the same rights therein as in the rest of the territory under the provision of the statute, now Highway Law, section 234, which says that "every highway that shall not have been traveled or used as a high-

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way for six years shall cease to be a highway." We do not think that statute is applicable to the facts here appearing.

At the time the above statute of 1876 was passed the state had a right as against claimant's predecessor to devote the land to street purposes on any condition which it saw fit to adopt. Because of the unconstitutionality of prior statutes purporting to give Beard and others the right to fill in, those people had acquired no rights which could be asserted as against the state or which prevented the state from withdrawing said land from any claims whatever against it by said persons. Under these circumstances it laid down the lines for the streets in question and declared them to be thereby "opened and established." It can hardly be believed that the state in so doing assumed that the streets would be improved and traveled in any ordinary way within six years. They were part of a general tract which was to be filled in by other people and in view of what has happened since we scarcely ought to charge the state with entertaining the expectation that Beard and his associates would fill in this land and create the necessity or even desirability of filling in and improving the street areas within six years. Prior to 1884 when the confirmatory act was passed no steps had been taken to work or assert an abandonment of these areas for street purposes. Like the rest of the tract, they laid there subject to future development and improvement. Under these circumstances when the legislature adopted the confirmatory act of 1884 I think we ought to assume that it did not intend to assert against itself an abandonment and turn over to Beard and his associates the areas included within these lines, simply because the public authorities had pursued the same waiting policy that the beneficiaries under the other acts had adopted. This would virtually have amounted to a repeal of the act of 1876 and we think it is much more reasonable to interpret the act of 1884 as confirming

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rights granted to claimant's predecessor under the act of 1873, less and excepting therefrom the area which intermediate the two acts had been appropriated by the state to street purposes.

Complaint has also been made by the claimant because as supposed by it no award was made for lands included within the lines of Hallock street and Bay street, as shown on the appropriation map. This complaint, however, seems to be based upon a misconception of the award. The Board of Claims found in response to claimant's request "that the area of the premises included within the lines of the appropriated area excepting therefrom the lands set apart for the Henry street basin and the Hicks street basin and the land included in Henry street and Columbia street as laid out and opened * * * is 1,442,022 square feet," and the award made in favor of claimant was for that number of square feet. Therefore, the area included within the lines of Hallock and Bay streets was not excluded from the award.

Various references are made by counsel to the report concerning the building of the barge canal and to the act providing for the acquisition by the state of lands necessary for that purpose and the supposed or alleged interest of claimant's predecessor in this tract of land. It is not asserted by the claimant that these references served in any manner to confirm or extend or fortify the title of its predecessor, and, as already stated, we agree with its counsel on the other hand that the appropriation of this land under the Barge Canal Act did not amount to a proceeding to forfeit any rights which the claimant might have in said premises.

The order of the Appellate Division and the determination of the Board of Claims should be affirmed, with costs in this court and in the Appellate Division so far as they hold that claimant is not entitled to any award on account of so much of the appropriated area as is included within the lines bounding and defining Hicks street and

Henry street basins and within the lines of Henry street and Columbia street, and otherwise said order and determination should be reversed and a new hearing granted, with costs to abide event.

CRANE, J. (dissenting). There are three reasons why the award made to the claimant herein should be sustained and the judgment of the Appellate Division affirmed.

First. By various acts of the legislature, William Beard and others, upland owners at Gowanus bay, were given the right to fill in the lands under water in front of their premises up to certain defined lines. The act of 1866 (Chap. 856) established the Brooklyn basin and gave to Beard the right "to build, construct and maintain a bulkhead with solid filling on the line established by the legislature of this State by chapter seven hundred and sixty-three, of the laws of eighteen hundred and fifty-seven, * * * and to fill in the land under water between high water line of the upland belonging to said owners of said real estate and the bulkhead hereby authorized to be constructed." The owners were also authorized to construct a pier running out from the bulkhead and a sea wall inclosing a basin of water between the sea wall and the solid filling upon the bulkhead line, which basin was to be known as "The Brooklyn Basin."

The act was not to take effect until the consent of the commissioners of the land office should first be obtained "to use the privileges intended to be granted by this act." The consent of the commissioners was thereafter obtained.

By chapter 702 of the Laws of 1873 and chapter 398 of the Laws of 1875, the bulkhead lines at Gowanus bay were materially changed in accordance with the report of a board of officers appointed by the president in pursuance of a concurrent resolution of the senate and assembly, passed April 6, 1872. The latter act provided: "Whereas,

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the board of officers appointed by the President * * * recommended the modification of the lines and spaces of the * * * Brooklyn Basin in accordance with the changes shown on a map annexed to said report; and, Whereas, William Beard, Jeremiah P. Robinson, Franklin Woodruff and others, owners of the *water front and lands adjacent to* * * * *said Brooklyn Basin* are desirous of carrying out the changes and modifications recommended in said report; now, therefore, the People of the State of New York * * * do enact as follows:

Section 1. The pier, bulkhead and other lines adjacent to the shores on the Brooklyn side of the port of New York * * * are hereby altered, declared and established as follows, that is to say: " Then follows a detailed statement of the changes, summed up at the end in these words: "The new lines hereby established being shown on a map entitled, 'map showing plan for the improvement of the *water front and adjacent lands* in the twelfth ward of the city of Brooklyn, New York, owned by William Beard, Jeremiah P. Robinson, Franklin Woodruff and others, dated March first, one thousand eight hundred and seventy-five, Leander N. Vibbard, city surveyor.'" The bulkhead line established according to this Vibbard map was so changed as to create two basins, each 200 feet wide, between tongues of land extending out to the sea-wall or bulkhead line. These basins were known as "Hicks Street Basin" and "Henry Street Basin" and were over 2,000 feet in length. Beard and his co-owners were given the right to fill in solidly the land each side of these basins up to the bulkhead line as designated on the map. Thereafter chapter 327 of the Laws of 1876 opened and *established* Henry street and Columbia street over the land to be filled in up to the bulkhead line.

The Vibbard map corresponds to the appropriation map in this proceeding, designating the property to be taken by the state for the canal terminal at this point.

Sufficient has been stated to show that Beard and others,

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the owners of the upland, had received from the state rights and privileges in the nature of grants which were very valuable to upland owners. Something more was done than merely to establish a bulkhead line. Rights and privileges were given to Beard and others which have never been withdrawn by the state.

The above acts, however, appropriating public property to local or private purposes were passed by a three-fifths vote of the legislature instead of the requisite two-thirds. (Constitution, art. 3, sec. 20.) To cure this defect chapter 491 of the Laws of 1884 was passed by two-thirds of the legislature, which confirmed the grants theretofore made by the acts of 1873 and 1875, above referred to. The fact that the legislature deemed it necessary to confirm these earlier grants by a two-thirds vote clearly indicates its understanding that private rights were granted in public property.

By appropriate legislation, therefore, the upland owners were granted the privilege and right of solidly filling in the land under water within the bulkhead lines as established by the Vibbard map. This franchise or right has never been withdrawn or revoked by the state, nor have any direct proceedings been taken to declare a forfeiture thereof. These valuable rights were owned by Beard, the upland owner, at the time the Barge Canal Terminal Act (Laws of 1911, chap. 746) was passed, authorizing the acquisition of his property at Gowanus bay. (*Thousand Island Steamboat Co. v. Visger*, 179 N. Y. 206, 213; *Archibald v. N. Y. C. & H. R. R. Co.*, 157 N. Y. 574; *Towle v. Remsen*, 70 N. Y. 303; *Fowler v. Coates*, 201 N. Y. 257, 263; *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 193; *Mackall v. Chesapeake & Ohio Canal Co.*, 94 U. S. 308; *Cluthe v. Evansville, M. C. & N. R. Co.*, 176 Ind. 162; *Treford v. Coney Island & B. R. R. Co.*, 6 App. Div. 205.)

The action of the canal board, in seeking to condemn these rights and privileges, or whatever property Beard

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had extending out to the bulkhead line, and to pay therefor, would indicate, at least, the recognition upon the part of the state of the existence of certain rights. (*Lehigh Valley R. R. Co. v. Canal Board*, 204 N. Y. 471.) The description of the property taken in this proceeding includes the following: "Being all the right, title and interest which the heirs and assigns of Wm. Beard and others received from the State of New York in the following acts of the State Legislature: Laws of 1847, chap. 202; Laws of 1851, chaps. 83 and 184; Laws of 1857, chap. 763; Laws of 1866, chap. 856; and Laws of 1875, chap. 398."

We can hardly assume that the state meant to destroy when it proposed to purchase. The canal board act and the proceedings thereunder can in no way be considered acts of forfeiture or proceedings by the state to terminate Beard's interest without compensation. (*Matter of N. Y. & Long Island Bridge Co. v. Smith*, 148 N. Y. 540.)

Non-user does not constitute abandonment. (*Wright v. Milwaukee El. Ry. & L. Co.*, 95 Wis. 29, 37.)

Second. In my opinion, chapter 491 of the Laws of 1884 did more than cure prior defective legislation, as above indicated. It confirmed and established the grants of 1873 and 1875 in fee simple.

That the state, having title to the lands under water of Gowanus bay, could grant the same in fee to the upland owner or to anybody else is beyond dispute. (*Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70; *Wetmore v. Brooklyn Gas Light Co.*, 42 N. Y. 384; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461; *Williams v. Mayor, etc., of New York*, 105 N. Y. 419; *People v. Steeplechase Park Co.*, 218 N. Y. 459.)

The crude language used by the legislature in making such grant cannot affect its validity provided the intention is clear and the provisions of the Constitution are complied with. Thus a grant may be made in fee although the act purports to confirm previous grants

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which were not in fee, provided the bill shall embrace but one object, which shall be expressed in the title.

The title of chapter 491 of the act of 1884 reads as follows: "An Act to ratify and confirm certain grants made in pursuance of section three of chapter seven hundred and two of the laws of eighteen hundred and seventy-three." The provisions of the act are contained in but one section, and are to the effect that the John Newton map (same as the Vibbard map) of the bulk-head lines at Gowanus bay, filed in the secretary of state's office on the 4th day of March, 1884, shall be sufficient evidence of the original map made by the commissioners appointed under the concurrent resolution of the senate and assembly in April, 1872, and that the grants of land under water to the exterior boundary line appearing upon said map are ratified and confirmed to the grantees thereof in fee simple. The title and the act deal with but one subject, and that is the grants, or privileges, or rights, conferred by the Laws of 1873 and 1875 above referred to, and it confirms or ratifies these grants in fee. "Confirm" means to strengthen, *to establish, to make more firm.* (Century Dictionary.)

Section 16 of article 3 of the Constitution is complied with when the title is such as to fairly suggest or give a clue to the subject, and, when that is expressed, all matters fairly or reasonably connected with it are proper to be incorporated in the act and are germane to the title. (*Sweet v. City of Syracuse*, 129 N. Y. 316, 331; *Astor v. Arcade R. Co.*, 113 N. Y. 93.) Chief Judge CHURCH, in *People ex rel. City of Rochester v. Briggs* (50 N. Y. 553, 558), said the object of this constitutional provision was to prevent the fraudulent insertion of provisions upon subjects *foreign* to that indicated in the title. "Nor should courts," he continued, "criticise too rigidly the details of a bill to find extraneous matter. Every presumption is in favor of the validity of legislative acts, and they are to be upheld unless there is a substantial depar-

ture from the organic law." In *Matter of Dept. of Public Parks* (86 N. Y. 437) it was said that the title need not be exact and precise in all respects, that it was sufficient if it conveys to the mind an indication of the subject to which it relates. (See, also, *Matter of Mayor of City of New York*, 99 N. Y. 569; *People ex rel. Olin v. Hennessy*, 206 N. Y. 33, 39; *Economic P. & C. Co. v. City of Buffalo*, 195 N. Y. 286; *People ex rel. Corscad-den v. Howe*, 177 N. Y. 499.)

The above title could deceive no one. It directed attention to the grants, whatever they were, made by the act of 1873; in other words, the grants under the Vibbard (Newton) map, and established these in fee simple. If this act of 1884 attempted to strengthen the rights or privileges granted under the previous acts and to firmly fix them as fee grants, it did so by its main provisions and sufficiently indicated it in the title so as not to mislead or deceive anybody. The claimant herein, therefore, had a fee to the lands appropriated by the canal board and the referee was right in so finding.

Third. But if we treat the rights under the above acts as capable of forfeiture unless exercised or acted upon, then I say that the findings in this case justify the conclusion that these rights and privileges have been used and the lands filled in and occupied by the upland owners.

William Beard, the claimant's predecessor in title, owned the upland extending from Reid street on the west of the appropriated property to Bryant street on the east of it. It was all one large extent or piece of upland. By various acts of legislation, some of which have been mentioned, the upland owners were given the right to fill in. The larger part of this water front and land under water to the bulkhead line has been filled in and the Erie basin established. The portion taken by the state in this proceeding is a little less than one-eighth of the whole of the bulkhead line of the Beard property. The land surrounding that appropriated by the state has

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been filled in by the claimant's predecessor in title up to a level with the surrounding country and the city grade of streets six or eight feet above mean high water. The filling also extends across the corner of the land appropriated outside of that which was formerly high land. Beard's property, land under water, has been filled in on either side of the portion here sought to be taken. The claimant's predecessor in title, after the act of 1875, also dredged within the limits of the Henry street basin created by that act and also constructed a pile pier across the outer boundary on substantially the bulkhead line established by the act and extending nearly across the lands appropriated by the state. A roadway was also constructed slightly to the west of where Columbia street would be, if said street had been opened as shown upon the maps of the city of Brooklyn and the city of New York. The lands appropriated have also been used by the upland owners for a dumping ground and they have derived a revenue therefrom by charging and collecting for the privilege of such dumping. This was a method of filling in. It has been stipulated that 82,655 square feet of the 1,442,022 square feet appropriated in this proceeding have been filled in by the owners of the upland pursuant to the rights granted under the acts of the legislature.

How can it be said that in view of these facts the privileges granted to Beard and others, the upland owners, by the legislature of this state have not been exercised and developed into rights of property?

For the above reasons, the determination of the Board of Claims was correct and the judgment of the Appellate Division affirming the same should be affirmed.

CHASE, COLLIN, HOGAN, CARDOZO and McLAUGHLIN, JJ., concur with HISCOCK, Ch. J.; CRANE, J., reads dissenting opinion.

Ordered accordingly.

JOSHUA SILVERSTEIN, Appellant, *v.* STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, Respondent.

Appeal — erroneous appeal to Appellate Division from a judgment entered on its own order.

An appeal does not lie to the Appellate Division from a judgment entered upon its own order dismissing a complaint. The judgment entered thereon in the county clerk's office is the final judgment of that court and an appeal lies therefrom to the Court of Appeals. (Code Civ. Pro. §§ 1317, 1336, 1355.)

Silverstein v. Standard Accident Ins. Co., 178 App. Div. 891, affirmed.

(Submitted June 6, 1917; decided October 2, 1917.)

APPEAL from a judgment entered April 30, 1917, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which dismissed an appeal taken by the plaintiff from a judgment entered upon a prior order of said Appellate Division reversing an order of Special Term, denying a motion by defendant for judgment in its favor on the pleadings and granting said motion.

The action was brought to recover upon a policy of liability insurance. The facts, so far as material, are stated in the opinion.

Isidor D. Morrison and Jacob R. Schiff for appellant. The Appellate Division committed error in dismissing the appeal from the judgment which was entered upon the order granting the defendant's motion for judgment on the pleadings. (Code Civ. Pro. § 1336; *Will v. Barnwell*, 197 N. Y. 298; *MacNamara v. Goldan*, 194 N. Y. 315.)

Frank Verner Johnson for respondent. The judgment from which the appeal to the Appellate Division was

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taken was not a judgment "rendered in the court below" or a judgment entered on an order at Special Term after the reversal of an interlocutory judgment by that court, but it was a judgment entered by the clerk of the county of New York upon the decision and order of the Appellate Division itself. (*Dwight v. Gibb*, 208 N. Y. 153; *Vose v. Conkling*, 159 App. Div. 201; *Andrews v. Cohen*, 215 N. Y. 699.)

CHASE, J. After the service of the complaint and answer both parties moved at Special Term for judgment upon the pleadings and the motions were denied. Both parties appealed from the order entered on such decision to the Appellate Division and the order was reversed (*Silverstein v. Standard Accident Insurance Company*, 175 App. Div. 639), and the motion of the defendant granted. The order of the Appellate Division was duly filed in the office of the clerk of the county of New York and judgment was entered thereon in favor of the defendant dismissing the complaint, with costs. The plaintiff then made application to the Appellate Division for leave to appeal to the Court of Appeals which application was denied. (*Silverstein v. Standard Accident Insurance Company*, 176 App. Div. 912.) An appeal was then taken to the Appellate Division from the judgment entered on its order granting the defendant's motion for judgment in its favor upon the pleadings. The Appellate Division dismissed the appeal (*Silverstein v. Standard Accident Insurance Company*, 178 App. Div. 891), and from the judgment entered upon that order dismissing the appeal an appeal is taken to this court. (*Stevens v. Central National Bank of Boston*, 162 N. Y. 253.)

Section 1355 of the Code of Civil Procedure relating to an appeal to the Appellate Division among other things provides: "* * * The order made upon the appeal must be entered in the office of the clerk of the Appellate

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Division, and a certified copy thereof with the original case or papers upon which the appeal was heard, filed as provided in section 1353 must be transmitted by the clerk upon payment of his fees, to the clerk of the county where the judgment or order appealed from was entered, and upon such certified copy of the order and the case or papers upon which the appeal was heard, the county clerk shall enter the judgment in his office." (*Dwight v. Gibb*, 208 N. Y. 153; *Andrews v. Cohen*, 215 N. Y. 699; *Jackson v. Smith*, 154 App. Div. 883.)

The judgment dismissing the plaintiff's complaint entered in the county clerk's office was the *judgment of the Appellate Division* and not of or by the direction of the Trial or Special Term and an appeal could have been taken therefrom to this court, as in the case of the appeal now being considered.

The question involved on this appeal does not depend upon section 1336 of the Code of Civil Procedure. (*McNamara v. Goldan*, 194 N. Y. 315, 320.) Section 1317 of the Code of Civil Procedure authorizes the Appellate Division to grant *final judgment* in a case like the one before it herein on the appeal from the order of the Special Term denying the motion for judgment upon the pleadings. (175 App. Div. 639.)

The Appellate Division was right in dismissing the appeal taken to it from its own judgment.

The judgment should be affirmed, with costs.

COLLIN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgment affirmed.

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**LEE A. OCHS, Appellant, *v.* ALBERT H. WOODS,
Respondent.**

Appeal — action for deceit and false representations — construction of statement in order of the Appellate Division that "the facts have been examined" — conflict of statements in direct examination and cross-examination for the jury to determine — facts examined in action for deceit and held that it was error to reverse judgment entered on verdict of a jury.

1. The statement in an order of the Appellate Division that the facts have been examined does not import either the approval or disapproval of them as found by the jury.

2. Where a witness makes one statement in the course of the direct examination and a contradictory statement on the cross-examination, there is a conflict in the evidence to be disposed of by the jury.

3. This action is to recover the damages sustained by the plaintiff through the alleged deceit of the defendant in inducing the plaintiff to accept another, in the place of the defendant, as owing him commissions for his services in securing a tenant of real estate. The trial resulted in a verdict in favor of the plaintiff. The Appellate Division reversed the consequent judgment and the order denying defendant's motion for a new trial, and dismissed the complaint. *Held*, that the evidence warranted its submission to the jury and that the Appellate Division erred in dismissing the complaint.

Ochs v. Woods, 160 App. Div. 740, reversed.

(Argued May 16, 1917; decided October 2, 1917.)

APPEAL from a judgment entered March 2, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Louis Frankel and David Cohen for appellant. A good cause of action for fraud and deceit was alleged in the

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complaint and the evidence adduced at the trial sustains the verdict rendered by the jury. (*Brackett v. Griswold*, 112 N. Y. 454; *Becker v. C. L. Ins. Co.*, 153 App. Div. 382; *King v. Leighton*, 22 Hun, 419; *Clark v. Rankin*, 46 Barb. 570; *Laska v. Harris*, 215 N. Y. 554; *Ettlinger v. Weil*, 94 App. Div. 291; *Kley v. Healy*, 127 N. Y. 555; *King v. Livingston*, 60 So. Rep. 143; *Yanelli v. Littlejohn*, 137 N. W. Rep. 723; *Wotscheck v. Neumann*, 138 N. W. Rep. 1000; *Howell v. Wyatt*, 168 Ill. App. 651.) There were questions of fact for the jury and, therefore, the Appellate Division erred in dismissing the complaint. (*Middleton v. Whitridge*, 213 N. Y. 499; *Faber v. City of New York*, 213 N. Y. 411; *Haight v. Hoyt*, 19 N. Y. 464; *Taylor v. Guest*, 58 N. Y. 262; *Henn v. Douglass*, 147 App. Div. 473; *Benton v. Kuykendall*, 160 S. W. Rep. 438; *Noyes v. Meharry*, 213 Mass. 598; *Schauer v. Bodenheim*, 150 Wis. 550.)

Nathan Burkans for respondent. The plaintiff failed to establish the cause of action alleged in the complaint, or any cause of action, and the reversal of the judgment and dismissal of the complaint were proper. (*Arthur v. Griswold*, 55 N. Y. 410; *Becker v. C. L. Ins. Co.*, 153 App. Div. 382; *Powell v. Linde Co.*, 58 App. Div. 261; 171 N. Y. 675; *Taylor v. Guest*, 58 N. Y. 266; *Hotchkiss v. T. N. Bank*, 127 N. Y. 329; *Prentiss Tool Co. v. Schrimmer*, 45 N. Y. S. R. 20; *O'Neill v. Kopke*, 170 App. Div. 604; *Matter of Case*, 214 N. Y. 203; *Jewell v. Parr*, 13 C. B. 915.) The dismissal of the complaint was proper. (*Bullock v. N. Y. C. & H. R. R. Co.*, 213 N. Y. 694; *Peterson v. O. E. R. Co.*, 214 N. Y. 44; Cardozo's Juris. Ct. App. § 19; *Brennan v. City of New York*, 123 App. Div. 7; *Middleton v. Whitridge*, 213 N. Y. 505; *Hotchkiss v. T. N. Bank*, 127 N. Y. 337.)

COLLIN, J. The action is to recover the damages sustained by the plaintiff through the alleged deceit of

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the defendant. The deceit, as charged, induced the plaintiff to accept another, in the place of the defendant, as owing him commissions for his services in securing a tenant of real estate. The trial resulted in a verdict in favor of the plaintiff. The Appellate Division, by its order of May 22, 1914, unanimously reversed the consequent judgment and the order denying defendant's motion for a new trial, and dismissed the complaint. The order stated that the facts had been examined and it appeared that the plaintiff failed to establish (1) that he earned any commission from the defendant, and (2) that he relied upon the representations made by the defendant. We decide that the evidence here warranted the submission of it to the jury and the Appellate Division erred in dismissing the complaint.

The evidence enabled the jury to find: In February, 1911, the defendant requested the plaintiff to procure a tenant, for a term of years, for the Brooklyn Court Theatre, at designated terms, and agreed to pay him for his commission in procuring the tenant sixty-two and one-half per cent of the excess of rent over the sum of fifteen thousand dollars received per year during the period of the lease, and to execute upon plaintiff's request the agreement in writing. The plaintiff, acting upon such request, secured a person who was willing to become the tenant at the designated terms, and demanded before he revealed the identity of the person that the defendant execute the agreement in writing. The defendant then told him that the theatre was owned and would have to be leased by a corporation, the majority of the stock of which defendant owned and of which he was president, and plaintiff would have to accept the written agreement of the corporation, instead of the defendant, to pay the commissions. He declined to deal with the corporation and stated that he wanted a paper whereby he knew he would be paid. The defendant then stated, in effect,

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to him that the corporation was solvent, had a surplus, was not in debt, was absolutely responsible and would pay him. The plaintiff thereupon accepted the written agreement of the corporation and disclosed to the defendant and the corporation the identity of the person willing to become the tenant, with whom the corporation entered into the lease at the designated terms, which have been fulfilled. The corporation was at the time in fact insolvent and did not and was unable to pay the plaintiff the commissions.

The essential constituents of the action are tersely and adequately stated as representation, falsity, *scienter*, deception and injury. (*Arthur v. Griswold*, 55 N. Y. 400; *Brackett v. Griswold*, 112 N. Y. 454; *Urtz v. New York Central & H. R. R. Co.*, 202 N. Y. 170; *Nash v. Minnesota Title Ins. & Trust Co.*, 163 Mass. 574.) There was, obviously, evidence sufficient in law to authorize the jury to find representation, falsity and *scienter*. The respondent asserts and argues that there was not any evidence of deception or injury.

If there was evidence that the plaintiff was influenced by the misrepresentation, the jury could have found that there was deception. It is incumbent upon a plaintiff in an action for deceit through false representations to show that he was influenced by them. It does not require very strong proof to establish it. In most cases, it may be inferred from the circumstances attending the transaction. (*Taylor v. Guest*, 58 N. Y. 262; *Fottler v. Moseley*, 179 Mass. 295.) A false representation is not cognizable by the law as deceit unless it is believed and relied upon as an inducement to action. If the misrepresentations contributed to the formation of plaintiff's determination to accept the promise of the corporation, they were deceiving, although other inducements may have participated. The plaintiff in cross-examination testified, in substance and effect, that it would have been

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a great mistake for him to have disclosed to the defendant the name of the person he had secured as tenant until defendant had given him the written statement of the agreement between them as promised; that he did not take defendant's word for anything, did not believe anything defendant told him, he knew defendant was a theatrical man and that such men are not worthy of much belief; "Q. And anything they say is a matter that no credence can be placed upon at all? A. I don't say that regarding anybody. Q. But regarding Woods, he was a man who was not worthy of belief? A. Well, I don't know; that is his reputation. * * * Q. But you think that when Woods asked you to reveal the name of the tenant, he would have cheated you, if he could? A. No. I wouldn't say that he would if he could. * * * Q. You saw to it that a lawyer looked over these papers? A. Surely. Q. You did not trust Woods himself, you did not take his word for anything he told you? A. No. Q. You wanted your lawyer to pass upon it? A. Absolutely." He had testified upon his direct examination that when the defendant told him that the theatre was owned by a corporation he stated that he had no dealings with the corporation; that in response to the statement of defendant that he would have to deal with the corporation and not with the defendant, he said, "Well, how do I know that this here Brooklyn Court Theatre Company will pay me?" that thereupon the defendant made the statements descriptive of the financial standing and condition of the corporation and after those statements were made he signed the agreement with the corporation, and further, "Q. When Mr. Woods made those statements to you regarding the financial condition of the Brooklyn Court Theatre Company, did you believe his statements to be true? A. Absolutely so. Q. And as a result of that belief you signed the exhibit, plaintiff's exhibit 3? A.

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Yes, sir." The answers elicited on cross-examination cannot be deemed, as a matter of law, a retraction or correction of the statements made in the direct examination. They sprang from a cross-examination concerning the unwillingness of the plaintiff to reveal the identity of the person obtained as the tenant before the defendant had signed the written agreement to pay the commissions. They may have been made without any relation in the plaintiff's mind to the misrepresentations of the defendant, to which the attention of the plaintiff was not then called. The circumstances attending the acceptance by the plaintiff of the agreement of the corporation conflicted with them. It is a case of a witness making one statement in the course of the direct examination and contradicting statement in the cross-examination. There was a conflict in the evidence to be disposed of by the jury. (*Tierney v. Boston Elevated Railway Co.*, 216 Mass. 283; *Donovan v. Chase-Shawmut Co.*, 205 Mass. 248; *Lury v. N. Y., N. H. & H. R. R. Co.*, 205 Mass. 540.)

The jury might reasonably have found also that the deceit caused damage to the plaintiff. In their permissible findings as already stated are the elements essential to a legal right enforceable by the plaintiff. The defendant promised plaintiff at the outset that the agreement should be evidenced by an executed writing. The promise created a right in plaintiff and an obligation on the part of defendant. Moreover, the jury might well have found that his unwillingness to tell who was to be the tenant had no part in the refusal of defendant, the false representations and the agreement with the corporation. The defendant did not make the disclosure of the person a condition precedent to any decision or action on his part or an element in the right of plaintiff. Through the deceit, plaintiff abandoned his legal right for its nearly valueless substitute. Deceit and injury concurred. The basic principle underlying all rules for

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the measurement of damages for deceit is indemnity for the actual loss sustained as the direct result of the wrong. The question is what was the value of that which plaintiff parted and what was the value of that which he received? (*Urtz v. New York Central & Hudson River R. R. Co.*, 202 N. Y. 170; *Krumm v. Beach*, 96 N. Y. 398; *Smith v. Bolles*, 132 U. S. 125.) The evidence warranted the finding of the jury that the plaintiff established the cause of action within the allegations of the complaint, and the Appellate Division erred in dismissing the complaint. Neither upon the trial nor here does the defendant question the correctness of the charge to the jury relating to the measure or amount of the damages, if any were recoverable. The statement in the order of the Appellate Division that the facts have been examined does not import either the approval or disapproval of them as found by the jury.

The judgment should be reversed and the case remitted to the Appellate Division for its consideration of the facts, with costs.

HISCOCK, Ch. J., CHASE, HOGAN, POUND, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

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LOUIS BOSSERT et al., Copartners under the Trade Name of LOUIS BOSSERT & SON, Respondents and Appellants, *v.* FREDERICK DHUY et al., Individually and as Business Agents of the JOINT DISTRICT COUNCIL OF NEW YORK AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, and AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS OF AMERICA et al., Appellants and Respondents.

Labor unions — injunction — right of carpenters brotherhood or union to refuse to use woodwork made by non-union manufacturers — when the sending by representatives of such union of notices to members of the union and to building contractors not to use such woodwork is not illegal — injunctions will not be granted to restrain such acts where there are no findings of malice or intent to injure the good will or business of the plaintiffs or non-union manufacturers.

1. The voluntary adoption by an association of employees of reasonable rules relating to persons for whom and conditions under which its members shall work is not illegal at common law. Neither is the enforcement of such rules by the association through fines or by expulsion from the association illegal.

2. Workingmen may organize for purposes deemed beneficial to themselves and in that organized capacity may determine that their members shall not work with non-members or upon specified work or kinds of work. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action.

3. A strike or boycott may be legal or illegal according to the acts involved therein. So an action for a direct and primary purpose in the interest of individuals or a combination of individuals taken in good faith to advance the interest of the individuals or combination may be useful, while a remote and secondary action which carries with it a degree of malice as a matter of law is illegal.

4. Plaintiffs operated an open shop for the manufacture of woodwork for houses and other buildings, and defendants were officers of a brotherhood or voluntary association of carpenters and joiners.

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The association adopted rules prior to any strike against the plaintiffs' materials that its members should not work on the products of any mill employing non-union men, and from time to time it circulated letters to contractors stating that in order to avoid labor troubles they were requested to stipulate for the employment of union men and union-made trim and other shop-made carpenter work, and that unless such materials were constructed under strict union conditions they would refuse to handle it, and that stipulating in the contracts that the trim must bear the union label would avoid all complications. The defendants having attempted to enforce the rules of the brotherhood against its members handling non-union made trim woodwork, this action was brought by the plaintiffs to obtain an injunction against the defendants taking action affecting the plaintiffs and the building material made in their mills. The courts below gave judgment perpetually enjoining the defendants from sending such letters to the plaintiffs' customers or inducing any person to refrain from working on material not bearing the union label. The findings of fact are that the rules of the association were adopted antedating any strikes against plaintiffs' material and that they were not adopted with the plaintiffs in view, but were intended to apply generally to all non-union mills; that they were adopted to increase wages and shorten hours of labor and to benefit the material condition of the members of the association, and had that effect in their enforcement; that the non-union mills, including that of the plaintiffs, compete in their products with the mills manned by the members of said United Brotherhood; that members of the brotherhood quit work on all jobs complained of because of their rules to work only on union material made by their own members, and of their own volition; that no labor contracts were violated and no violence or threat of violence, and that in all matters complained of they acted against all non-union employers without malice towards the plaintiffs. It also appears that it was not the intent and purpose of the defendants to injure the good will or business of the plaintiffs as individuals or of non-union manufacturers generally. Held, that the facts do not support the judgment. (*National Protective Association v. Cumming*, 170 N. Y. 315; *Paine Lumber Co. v. Neal*, 244 U. S. 459, 471, followed.)

Bosseret v. Dhuy, 166 App. Div. 251, reversed.

(Argued April 6, 1917; decided October 9, 1917.)

APPEAL by the defendants from a judgment of the Appellate Division of the Supreme Court in the second

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judicial department, entered January 7, 1915, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action for an injunction. Also appeal, by the plaintiffs, from the same judgment in so far as it denies or omits to grant and award the plaintiffs certain portions of the relief prayed for.

The material part of the judgment appealed from is as follows: "It is adjudged that the defendants, their attorneys, agents, servants, associates and all persons acting in aid of or in connection with them and each of them, be and they hereby are perpetually enjoined and prohibited from conspiring, combining, or acting in concert in any manner to injure or interfere with the plaintiffs' good will, trade or business by any of the following means, to wit:

" By sending to any customer or prospective customer of plaintiffs, any letter, circular or communication printed, written or oral which in terms or by inference suggests that labor troubles will follow the use of materials purchased from plaintiffs or from any person, firm or corporation declared unfair or whose material does not bear the union label, meaning the plaintiffs thereby; or

" By inducing, ordering, directing, requiring or compelling by any by-law, rule or regulation or any act thereunder any person whatever to refrain from or cease working for any person, firm or corporation because they use material purchased of or furnished by plaintiffs, or by any person, firm or corporation declared unfair, or whose material does not bear the union label, meaning the plaintiffs thereby.

" And the defendants are further enjoined from inducing any workmen in other trades to quit work on any building because non-union carpenters are there employed to install the plaintiffs' materials which union carpenters refuse to handle or install.

" Nothing herein contained is to be construed to

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prevent peaceable strikes except those directed against customers or prospective customers of plaintiffs for the purpose of injuring or interfering with plaintiffs' good will, trade or business."

The judgment of the Special Term was unanimously affirmed by the Appellate Division (*Bossert v. Dhuy*, 166 App. Div. 251) and the order of affirmance expressly states that the court "unanimously decided that the findings of fact are supported by the evidence." The facts found by the Special Term and so unanimously affirmed, as far as now material, are stated in the opinion.

Charles Maitland Beattie for defendants, appellants and respondents. The judgment is not warranted on the findings regarding motives, methods, self-interests and free individual volition in quitting work. (*A. P. Hogle Co. v. Mulvaney*, N. Y. L. J., May 11, 1912.) Men should not be compelled to work against their pecuniary interests and to lower their standard of living and to limit their chances of employment, as found in this case. (Martin on Law of Labor Unions, 34; *Nat. Fireproofing Co. v. Mason Builders*, 169 Fed. Rep. 259; *Allis-Chalmers v. Iron Moulders Union*, 150 Fed. Rep. 155; *Davis v. United Portable H. Engineers*, 28 App. Div. 396; *W. P. D. Machinery Co. v. Robinson*, 41 Misc. Rep. 329.) The generally accorded right to refuse to work with non-union men must be accorded to quit work on a non-union thing. (*McCord v. Thompson-Starrett Co.*, 129 App. Div. 130; 198 N. Y. 589; *Nat. Fireproofing Co. v. Builders*, 169 Fed. Rep. 259; *Kellogg v. Sowerby*, 190 N. Y. 370; *Mogul S. S. Co. v. McGregor*, L. R. A. C. 1892, 25; *Crawford v. Tyrrell*, 128 N. Y. 341; *Paine v. Neal*, 212 Fed. Rep. 259.) The findings will not warrant the judgment on the theory that an unlawful boycott is disclosed. (*Loewe v. Lawlor*, 208 U. S. 274; *Mills v. U. S. Printing Co.*, 99 App. Div. 605; *Kissam v. U. S.*

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Printing Co., 128 App. Div. 889; *Park & Sons Co. v. Nat. D. Assn.*, 175 N. Y. 1; *Butterick Co. v. Typo. Union*, 50 Misc. Rep. 1; *Reynolds v. P. P. Assn.*, 30 Misc. Rep. 716; *Shinola Co. v. Krieg*, 75 Misc. Rep. 220.) The injunction cannot stand on the theory that defendants have violated the state Monopoly Act and certain conspiracy provisions of the penal laws. (*Blindell v. Hogan*, 59 Fed. Rep. 40; 56 Fed. Rep. 696; *Greer Mills v. Stroller*, 77 Fed. Rep. 1; *Nat. Fireproofing Co. v. Builders*, 169 Fed. Rep. 259; *Montgomery Ward & Co. v. S. D. R. M. & H. D. A.*, 150 Fed. Rep. 413; *Locker v. Am. Tobacco Co.*, 121 App. Div. 443; 195 N. Y. 565.)

Walter Gordon Merritt for plaintiffs, respondents and appellants. The combination violates sections 340 and 341 of the General Business Law of New York, and plaintiffs being irreparably injured in their property rights by such unlawful acts are entitled to protection by injunction. (*United States v. Knight*, 156 U. S. 1; *Miles Medical Co. v. Parks & Sons Co.*, 220 U. S. 373.) If the object of the combination be unlawful, it is immaterial that the means whereby it is carried out are lawful. The right to work or quit work is not more absolute than any other constitutional right and becomes illegal when exercised for the purpose of injuring another or accomplishing a result contrary to public policy or restraining trade contrary to statute or common law. (*Aikens v. Wisconsin*, 195 U. S. 204; *United States v. Debs*, 64 Fed. Rep. 724; *Gompers v. Buck S. & R. Co.*, 221 U. S. 418; *Swift & Co. v. U. S.*, 196 U. S. 375; *U. S. v. Reading*, 226 U. S. 324; *Loewe v. Lawlor*, 208 U. S. 274; *United States v. Rintelen*, 233 Fed. Rep. 793; *Rourke v. Elk Drug Co.*, 75 App. Div. 145; *Grassi Cont. Co. v. Bennett*, 174 App. Div. 244; *Arthur v. Oakes*, 63 Fed. Rep. 310; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Mapstrick v. Ramge*, 2 N. W. Rep. 297.) The combina-

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tion charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes, and such a combination violates the Anti-Trust Laws. (*Loewe v. Lawlor*, 208 U. S. 274; *Northern Securities Co. v. U. S.*, 193 U. S. 197; *United States v. Patten*, 226 U. S. 525; *Standard Oil Co. v. United States*, 221 U. S. 1; *State v. Duluth Board of Trade*, 121 N. W. Rep. 395; *Merchants Legal Stamp Co. v. Murphy*, 107 N. E. Rep. 968; *Comm. v. North Shore Ice Co.*, 107 N. E. Rep. 402; *Brown & Allen v. Jacobs Pharmacy*, 41 S. E. Rep. 553.) The combination violates sections 340 and 341 of the General Business Law, which is the state Anti-Trust Law. (*Irving v. Neal*, 209 Fed. Rep. 471; *Paine v. Neal*, 212 Fed. Rep. 259; *People v. McFarlin*, 43 Misc. Rep. 591; 89 Misc. Rep. 527; *Gill Engraving Co. v. Doerr*, 214 Fed. Rep. 111, 118; *Auburn Draying Co. v. Wardell*, 89 Misc. Rep. 501; *Matter of Davies*, 168 N. Y. 89; *People v. American Ice Co.*, 120 N. Y. Supp. 443; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401; *People v. Klaw*, 106 N. Y. Supp. 341; *People v. Duke*, 44 N. Y. Supp. 336; 19 Misc. Rep. 292; *De Witt Wire Cloth Co. v. N. J. Wire Cloth Co.*, 14 N. Y. Supp. 277.) The federal Anti-Trust Law and the state Anti-Trust Law being both declaratory of the common law in their respective jurisdictions, authorities construing the federal Anti-Trust Law are applicable in construing the state Anti-Trust Law, and confirm our conclusion. (*Loewe v. Lawlor*, 208 U. S. 274; *Lawlor v. Loewe*, 235 U. S. 522; *E. S. R. L. D. Assn. v. U. S.*, 234 U. S. 600; *Montague v. Lowry*, 193 U. S. 38; *Irving v. Neal*, 209 Fed. Rep. 471; *Paine v. Neal*, 212 Fed. Rep. 259; *State v. Bd. of Trade*, 121 N. W. Rep. 395.) The plaintiffs being irreparably injured in their property rights by acts in violation of the state Anti-Trust Law, are entitled to an injunction.

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(*Straus v. American Publishers' Assn.*, 177 N. Y. 473; 231 U. S. 222; 85 App. Div. 446; *Irving v. Neal*, 209 Fed. Rep. 471; *Paine v. Neal*, 212 Fed. Rep. 259; *People v. McFarlin*, 43 Misc. Rep. 591; 89 N. Y. Supp. 527; *Gill Engraving Co. v. Doerr*, 214 Fed. Rep. 111; *Kellogg v. Sowerby*, 190 N. Y. 370; *Park & Sons Co. v. Nat. D. Assn.*, 175 N. Y. 1; *Locker v. American Tobacco Co.*, 121 App. Div. 443; 195 N. Y. 565; *Rourke v. Elk Drug Co.*, 75 App. Div. 145; *United States v. Addyston P. & S. Co.*, 85 Fed. Rep. 279.) The combination violates subdivision 6 of section 580 of article 54 of the Penal Law, forbidding conspiracies "to commit any act injurious to trade or commerce," and complainant is entitled to protection therefrom. (*Auburn Draying Co. v. Wardell*, 89 Misc. Rep. 501; *Irving v. Neal*, 209 Fed. Rep. 471; *Paine v. Neal*, 212 Fed. Rep. 259; *People v. McFarlin*, 43 Misc. Rep. 591; 89 N. Y. Supp. 527; *Gill Engraving Co. v. Doerr*, 214 Fed. Rep. 111; *State v. Minn. Milk Co.*, 144 N. W. Rep. 417; *People v. Dwyer*, 215 N. Y. 46; *Kellogg v. Sowerby*, 190 N. Y. 370; *People v. Sheldon*, 139 N. Y. 251; *Leonard v. Poole*, 114 N. Y. 371.) The combination violates subdivision 5 of section 580 of the Penal Law. (*People v. Davis*, 159 App. Div. 464; *Auburn Draying Co. v. Wardell*, 89 Misc. Rep. 501; *People v. McFarlin*, 43 Misc. Rep. 591; 89 N. Y. Supp. 527; *Newton v. Erickson*, 70 Misc. Rep. 291; 126 N. Y. Supp. 949; 144 App. Div. 939; 166 App. Div. 251; *Thomas v. M. M. P. Union*, 121 N. Y. 50; *Davis v. Zimmerman*, 36 N. Y. Supp. 303; *People v. Klaw*, 55 Misc. Rep. 72.) The defendants' combination violates section 530 of article 48 of the Penal Law. (*People v. Barondess*, 16 N. Y. Supp. 436; 133 N. Y. 649; 61 Hun, 571; *People v. Warden*, 130 N. Y. Supp. 698; 190 N. Y. 537; *People v. Hughes*, 137 N. Y. 29; *People v. Hawkins*, 157 N. Y. 1; *Davis v. Zimmerman*, 71 N. Y. S. R. 385; 36 N. Y. Supp. 304; *Matthews v. Shankland*, 56 N. Y.

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Supp. 123; 25 Misc. Rep. 604; *People v. McFarlin*, 89 N. Y. Supp. 527; 43 Misc. Rep. 591; *State v. Glidden*, 55 Conn. 47; *Wyeman v. Deady*, 79 Conn. 414.) Section 582 of the Penal Law of the state of New York is declaratory of the common law and does not legalize the defendants' acts. (*Frank v. Herold*, 52 Atl. Rep. 152; *Erdman v. Mitchell*, 207 Penn. St. 79; *Goldberg v. Stablemen's Union*, 86 Pac. Rep. 896; *Branson v. Industrial Workers*, 95 Pac. Rep. [Nev.] 354; *Thacker Coal & Coke Co. v. Burke*, 53 S. E. Rep. 161; *People v. Davis*, 159 App. Div. 464; *Auburn Draying Co. v. Wardell*, 89 Misc. Rep. 501; *Thomas v. M. M. P. Union*, 121 N. Y. 50; *Matthews v. Shankland*, 56 N. Y. Supp. 123; 25 Misc. Rep. 604; *People v. McFarlin*, 89 N. Y. Supp. 527; 43 Misc. Rep. 591; *Schlang v. Ladies' Waist Workers*, 124 N. Y. Supp. 289; 67 Misc. Rep. 221.) The combination of the defendants to bring about the employment of members of their organization exclusively in their industry throughout an entire community, is unlawful. (*Montague v. Lowry*, 193 U. S. 38; *Nat. Protective Assn. v. Cummings*, 170 N. Y. 315; *Jacobs v. Cohen*, 183 N. Y. 207; *McCord v. Thompson-Starrett Co.*, 129 App. Div. 130; 198 N. Y. 587; *Grassi Cont. Co. v. Bennett*, 174 App. Div. 244; *Schwarz v. I. L. G. Workers*, 68 Misc. Rep. 528; *Schlang v. L. W. Workers*, 67 Misc. Rep. 221; *Connors v. Connolly*, 86 Conn. 641; *Davis Machine Co. v. Robinson*, 41 Misc. Rep. 329; *Tunstall v. Stearns Coal Co.*, 192 Fed. Rep. 808.) The facts establish a combination to cause strikes against customers of plaintiffs for the purpose of preventing the sale of their products as long as they operate an open shop, and is, in effect, a secondary boycott of the plaintiffs, which is unlawful. (*Loewe v. Lawlor*, 208 U. S. 274; *Bosser v. Dhuy*, 166 App. Div. 251; *Purvis v. Local 500*, 214 Penn. St. 348; 63 Atl. Rep. 585; *Shine v. Fox Bros. Mfg. Co.*, 156 Fed. Rep. 357; *Huttig Sash & Door Co. v. Fuelle*,

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143 Fed. Rep. 363; *Lohse Patent Door Co. v. Fuelle*, 114 S. W. Rep. [Mo.] 1001; *Booth v. Burgess*, 65 Atl. Rep. [N. J.] 226; *Irving v. Joint District Council*, 180 Fed. Rep. 896; *Newton v. Erickson*, 70 Misc. Rep. 291; 144 App. Div. 939; 165 App. Div. 930; *People v. McFarlin*, 89 N. Y. Supp. 527; 43 Misc. Rep. 591.) A combination of traders to promote their own interests by suppressing the competition of rivals is illegal at common law, and it is immaterial whether the combination aims at one rival or a class of rivals. (*Hawardin v. Y. & L. Coal Co.*, 111 Wis. 545; *Bailey v. Assn. of Plumbers*, 52 S. W. Rep. 853; *Walsh v. Assn. of Master Plumbers*, 71 S. W. Rep. 455; *Gatzow v. Burning*, 106 Wis. 1; *Martell v. White*, 185 Mass. 255; *Boutwell v. Marr*, 71 Vt. 1; *E. P. Club v. Blosser*, 122 Ga. 509; *Brown & Allen v. Jacobs Pharmacy*, 41 S. E. Rep. 553; *Purington v. Hinchliff*, 76 N. E. Rep. 47; *Doremus v. Hennessy*, 176 Ill. 608.)

CHASE, J. The plaintiffs are copartners engaged in the borough of Brooklyn, city of New York, in the manufacture, purchase and sale of doors, sash, blinds, trim, lumber and other kinds of woodwork. They employ from five to six hundred persons in their factories in the production of such woodwork, but do not perform any work in the installation of the woodwork so manufactured by them. All of such woodwork is sold to builders. The defendants are officers, representatives and agents of the United Brotherhood of Carpenters and Joiners of America and of its branches in the city of New York and vicinity. The United Brotherhood of Carpenters and Joiners of America, hereinafter called the Brotherhood, is a voluntary unincorporated association of workmen. It has a membership of about 200,000 journeymen carpenters with headquarters at Indianapolis, Indiana, subdivided into about 1,900 local branches, also voluntary unincorporated associations, over seventy of which local associations are within the limits of the city of New York.

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All manufacturers of woodwork who do not operate under an agreement with said Brotherhood or one of its branches and do not agree to employ union carpenters exclusively, are known by the defendants as non-union, unfair or open shop manufacturers and their products are known as non-union, unfair or open shop materials.

The plaintiffs operate an open shop, selecting their employees without discrimination against any person on the ground that he is or is not a member of the local union, and pursue this policy as a matter of principle and not for mercenary reasons, and for many years the relations between the plaintiffs and their employees were mutually satisfactory. The Brotherhood issues a monthly paper, its official organ, called *The Carpenter* and holds biennial conventions attended by delegates elected from the local unions. Since 1904 the Brotherhood has been engaged in a general combination among other things to prevent the employment of non-union carpenters or woodworkers in woodworking factories, or in erecting certain kinds of woodwork and has adopted rules which forbid its members from working for any employer who employs any so-called non-union carpenters, and from working on or in connection with any building where materials are used which are purchased from any employer who employs non-union carpenters, and the constitution of the Brotherhood provides that it shall be the duty of local unions to prevent its members encouraging the use of any unfair material by handling the same.

From time to time the Brotherhood in connection with the joint district council of the carpenters' union have circulated a letter which in part is as follows:

"To Owners, Architects, Contractors, and Builders of New York City and Vicinity:

"GENTLEMEN.—In order to avoid any labor trouble on jobs you are interested in we deem it necessary to request you to stipulate in all your contracts a clause

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guaranteeing the employment of recognized union men, also a clause requiring in the execution of all contracts for carpenter work the employment of union made trim, mantels, parquet flooring, and other shop made carpenter work. This applies particularly to all classes of kalamein and metal covered work.

"We desire to inform you that unless this material has been constructed under strict union conditions we shall refuse to handle it. It being a well known fact that the agents of unfair and non-union firms resort to mis-statements in order to obtain contracts in this city we recommend that before placing contracts with any firm not on this list you communicate with this organization regarding the union standing of said firm.

"Stipulating in your contract that your trim, etc., must bear this union label (here appears a cut of label) will avoid all complications."

The rules of the Brotherhood provide in substance that if any member is proven guilty of working with non-union carpenters or on material made in a shop where non-union carpenters are employed, he shall be subject to fine or expulsion from the association.

The defendants having attempted to enforce the rules of the Brotherhood against its members handling non-union made woodwork, this action was brought by the plaintiffs to obtain an injunction against the defendants taking (in substance) any action affecting the plaintiffs and the building material made in their mills.

In *National Protective Association v. Cumming* (170 N. Y. 315, 320) Chief Judge PARKER stated that he would assume that certain principles of law laid down in the opinion of Judge VANN in that case are correct, namely: "It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed but for no fixed period, either may end the contract whenever he chooses. The one may work, or refuse to work, at will, and the

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other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from any one. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike; that is, to cease working in a body by prearrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not in violation of law."

After quoting from the opinion of Judge VANN, as stated, he added: "Stated in other words, the propositions quoted recognize the right of one man to refuse to work for another on any ground that he may regard as sufficient, and the employer has no right to demand a reason for it. But there is, I take it, no legal objection to the employee's giving a reason, if he has one, and the fact that the reason given is, that he refuses to work with another who is not a member of his organization, whether stated to his employer or not, does not affect his right to stop work nor does it give a cause of action to the workman to whom he objects because the employer sees fit to discharge the man objected to rather than lose the services of the objector. The same rule applies to a body of men who, having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse

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longer to work, it is their legal right to stop * * *. And whenever the courts can see that a refusal of members of an organization to work with non-members may be in the interest of the several members, it will not assume, in the absence of a finding to the contrary, that the object of such refusal was solely to gratify malice and to inflict injury upon such non-members. * * * Those principles concede the right of an association to strike in order to benefit its members; and one method of benefiting them is to secure them employment, a method conceded to be within the right of an organization to employ."

Judge McLAUGHLIN, now of this court, then in the Appellate Division, writing in the *National Protective Association v. Cumming* case in that court (53 App. Div. 227, 230) said: "The Enterprise Association refused to permit its members to work upon any job where the members of the plaintiff were employed, and informed the employer in each instance that unless the members of the plaintiff were discharged its members would strike or, in other words, abandon the job, which they did, or threatened to do, in the three instances specified in the complaint; that they neither used force nor did anything tending to a breach of the peace, other than that included in its threat to order a strike or withdraw its members, as well as the members of the other associations allied with it, from the work on which they were engaged. * * * This is all that the Enterprise Association did. It was seeking to obtain employment for its own members, and wherever it found places filled by members of the plaintiff association it procured their discharge in order that the employment might be given to members of the Enterprise Association, and in case that was not done, they either withdrew or threatened to withdraw from the work."

It is unnecessary in the case now under consideration

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to hold that in all cases and under all circumstances, whatever a man may do alone he may do in combination with others, but it was clearly established in the *National Protective Association* case that workingmen may organize for purposes deemed beneficial to themselves and in that organized capacity may determine that their members shall not work with non-members or upon specified work or kinds of work.

It was not illegal, therefore, for the defendants to refuse to allow members of the Brotherhood to work in the plaintiffs' mill with non-union men. The same reasoning results in holding that the Brotherhood may by voluntary act refuse to allow its members to work in the erection of materials furnished by a non-union shop. Such action has relation to work to be performed by its members and directly affects them. The voluntary adoption of a rule not to work upon non-union made material and its enforcement differs only in degree from such voluntary rule and its enforcement in a particular case. Such a determination also differs entirely from a general boycott of a particular dealer or manufacturer with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer. An act, when done maliciously and for an illegal purpose, may be restrained; and held to be within the bounds of reasonable business competition when done in good faith and for a legal purpose. (See Ruling Case Law, vol. 16, pp. 431, 432 and 433.)

It appears by findings that are uncontroversially established by reason of the unanimous affirmance of the Special Term by the Appellate Division that it was not the intent and purpose of the defendants in this case to injure the good will or business of the plaintiffs as individuals or of non-union manufacturers generally. In refusing to work on non-union made material, they were conserving their interests as individuals and as members

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of the Brotherhood, and in so doing necessarily interfered to some extent with non-union manufacturers. Such interference necessarily resulted to some extent also in the *National Protective Association* case, and such fact did not prevent the court sustaining the action of the defendants therein. The importance of the facts in each case involving individual or associate action affecting the relations of employers and employees is such that even although it materially increases the length of this opinion, we quote some of the important findings mentioned:

“1. The United Brotherhood of Carpenters and Joiners of America is a voluntary association and trade union of carpenters whose members consist of so-called ‘outside carpenters’ who work on buildings, and ‘inside carpenters,’ who work in mills.

“7. That the members have adopted rules *antedating any strikes* against plaintiff’s material, by which outside members are not to work on mill products not made in mills manned by their inside members.

“8. That said rules were not adopted with the plaintiff in view, but were intended to apply generally to the products of all non-union mills.

“10. The non-union mills, including that of the plaintiff, compete in their products with the mills manned by the members of said United Brotherhood.

“11. That the said United Brotherhood has established a union or minimum rate of wages, and fixed certain hours per day for its members to work, but said union rate of wages does not prevent employers from paying a higher rate of wages to any or all members whom they employ.

“14. The more mills that are unionized the more chance have the outside and inside carpenters of said United Brotherhood to obtain work at union wages and under union conditions.

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dition of the members of said United Brotherhood not to install the mill products of plaintiff in buildings.

“18. That the defendants believe it would be to their advantage not to handle the mill products of the plaintiff, and in the matters complained of have been actuated by that belief and motive.

“19. That it would tend to increase the sale of union mill products made by the inside carpenters, members of the United Brotherhood and so secure them in work and increase the chances of outside members to obtain work in union mills, for the outside members to refuse to handle the non-union mill products of the plaintiff.

“21. That none of the members of said United Brotherhood who refuse to install any of the mill products of plaintiff were under contract to give their services for any particular period.

“24. There was no violence, nor any threat of violence, on the part of the defendants in connection with any of the acts complained of.

“25. That no threat, coercion or intimidation was used by any of these defendants to induce the union carpenters to quit work where strikes against plaintiff's material occurred, except the enforcement of the by-laws.

“26. That none of the defendants interfered in any way to prevent the different employers herein whose jobs were struck from procuring non-union carpenters to continue their work.

“29. That the members of the United Brotherhood quit work on all the jobs complained of because of their said rules to work only on union material made by their own members, and *of their own volition*.

“30. That in all matters complained of herein the defendants acted without malice towards plaintiff.

“32. The primary motive and purpose the defendants had in view in all the matters complained of regardless of whether their acts would be in furtherance of such

motive and purpose — or not — were to benefit their fellow-members in said brotherhood by procuring them work and helping the sale of the union-made mill products of their fellow-members in mills.

“35. The defendants have refused to install the mill products of other non-union mills than that of the plaintiff.

“43. That to compel the members of said United Brotherhood to work on the mill products of the plaintiff limits the sale of the union mill products made by its members, and, to that extent tends to throw them out of work.

“44. That generally the union rate of wages is higher and the hours of work shorter per day than in non-union mills.

“46. That the union rate of wages and hours tends to a higher and better standard of living than the non-union rates and hours.

“49. That the hours of labor in plaintiff’s mill are more than eight hours per day.”

The trial court also found “That said Brotherhood has adopted and sought to enforce and in many instances has enforced rules which forbid and prevent its members from working for any employer who employs any so called non-union carpenters and from working on or in connection with any building where materials are used which are purchased from any employer who employs any non-union carpenters.”

In considering this finding of the court we must keep in mind the fact that the action of the Brotherhood did not interfere with any contract between employer and employee. Its action was open and clearly defined and its enforcement was not designed to and did not include any force, fraud, threat or defamation. Its action was voluntary and concerned labor competition in which the association and its members are vitally interested.

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of reasonable rules relating to persons for whom and conditions under which its members shall work is not illegal at common law. (*National Protective Association v. Cumming, supra; Macauley Brothers v. Tierney*, 19 R. I. 255; *Bohn Manufacturing Co. v. Hollis*, 54 Minn. 223; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581; Martin Modern Law of Labor Unions, 109; *Gill Engraving Co. v. Doerr*, 214 Fed. Rep. 111; *State v. Van Pelt*, 136 N. C. 663; Ruling Case Law, vol. 16, 450.)

Neither is the enforcement of such rules by the association through fines or by expulsion from the association illegal. Members are thus simply required to obey rules of the association so long as they remain members thereof. (*Bohn Manufacturing Co. v. Hollis, supra*.)

An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action.

Workingmen cannot be compelled to work when by so doing their position as workingmen will be injured, simply because if they do not continue their work a manufacturing employer will not be able to sell as large a quantity of material as he otherwise would and thus his good will, trade or business may be affected. (See extended discussion in Harvard Law Review, vol. 20, pp. 253, 345, 429.) "The United States Supreme Court has recently had before it the case of *Paine Lumber Company v. Neal*, 244 U. S. 459, 471 (advanced sheets, August 1, 1917) which was an action to enjoin the United Brotherhood of Carpenters and Joiners of America from con-

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spiring to have its members refuse to work upon material made by the plaintiffs in that action because not made by union labor, and also to enjoin them from enforcing bylaws intended to prevent its members from working upon what is called unfair material. The injunction was denied. Justice HOLMES speaking for the court in affirming the judgment appealed from, and referring to the merits of the controversy, said, 'As this Court is not the final authority concerning the laws of New York we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York Court of Appeals. *National Protective Association of Steam Fitters & Helpers v. Cumming*, 170 N. Y. 315. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture or building since the more successful it is the more competitors are introduced into the trade. Cases like *Kellogg v. Sowerby*, 190 N. Y. 370, concerning conspiracies between railroads and elevator companies to prevent competition, seem to us very clearly not to have been intended to over-rule the authority that we cite, and not to have any bearing on the present point.'

The facts in the *Paine Lumber Company* case were substantially the same as the facts in the case now before us, and we understand the Supreme Court of the United States to assert in substance and effect that an ordinary common law action should not, even considered with the statutes now in force, be sustained in this state upon the facts shown in that case, or in the case now before us.

The decision in this case also contains a finding as follows: "That in the year 1910 the defendants entered into a combination to organize all the non-union mills of Brooklyn and a resolution was passed at the convention of the United Brotherhood in 1910 to carry out that campaign in the borough of Brooklyn.

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"That subsequently and on or about September 15, 1910, four or more strikes were called in one day against building operations in Brooklyn * * * and the carpenters employed * * * quit work on orders of the business agents."

Upon all of the findings before us the statement in the finding that there was a "combination to organize all the non-union mills of Brooklyn" simply means that the Brotherhood determined to carry out the provisions of its constitution relating to non-union made material by insisting upon its enforcement and by imposing the penalties provided thereby in case of failure of any of its members to comply therewith. The further statement as to the "orders of the business agents" simply means that the representatives of the Brotherhood called the attention of union carpenters employed on buildings where non-union material was being erected to the consequences to them as members of the Brotherhood in case they continued such employment.

The importance of the findings of fact in each case is shown in the records before us herein. Justice BLACKMAR in *Newton Co. v. Erickson* (70 Misc. Rep. 291) granted an application for a preliminary injunction while then Justice CRANE (77 Misc. Rep. 592) in this case denied an application to punish one of the defendants for contempt for an alleged disobedience of the preliminary injunction. The form of the injunction in each case was the same. It will be seen that the conclusions reached by the justices respectively were based upon the facts as they severally appeared and were construed by them. Justice BLACKMAR a little later (*A. P. Hogle Co. v. Mulvaney*, N. Y. L. J., May 11, 1912) referred to the *Newton* case on the application for a preliminary injunction and to the decision in the *National Protective Association* case and said that the *Newton* decision made by him was based upon his finding that

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the defendants intended to injure the business of the plaintiff. It is now unanimously found that the defendants did not have a primary intent to injure the plaintiffs,

Upon all the findings of fact in this case the court found as conclusions of law:

“1. It was lawful for the members of the carpenters’ unions to agree, and embody that agreement in a constitution and by-laws, that they would not work upon any mill products which were not union made.

“2. It was lawful for the members of said unions to adopt by-laws by which each agreed he should be subject to a fine if he was found working knowingly on non-union mill products.

“3. It was lawful for these unions to elect and employ certain of their members to notify the other members as to whether the mill work they were engaged upon was union or non-union.

“4. It was lawful for the union members to quit work in a body whenever they ascertained that non-union mill work was presented to them to work upon.

“5. Their right to quit work in a body on the mill work of the plaintiff would not be lost or changed because the striking men had in view the fact that such a strike would tend to reduce the sales of the plaintiff’s mill products.

“6. The right to quit work in a body on the mill work of plaintiff would not be lost or changed because the striking men had in view the fact that such a strike would tend to increase the sales of the union made mill products by their fellow-members in mills.

“7. The plaintiff has no right to have the services of the union carpenters in the erection of its mill work if they do not want to work upon it.

“8. The union members have the right to inform any builder that they will only work on mill products made by their own members in mills.

“9. They have the same right to so inform the builder

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before he purchased mill products as when he asked them to work upon and install mill products."

Notwithstanding the quoted and other conclusions of law found by the court in this case which would seem to preclude a judgment in favor of the plaintiffs the court found as follows:

"That the combination of the defendants to prevent the sale, use and installation of the plaintiff's wood materials by causing all union carpenters to refuse to handle said materials or work upon any building where said materials were being used, is illegal.

"That the combination of the defendants, as set forth in the findings of fact, constitutes an illegal conspiracy.

"That the combination of the defendants, as set forth in the findings of fact, and the acts in furtherance thereof, constitutes an illegal conspiracy to injure the plaintiff contrary to common law."

By reading the opinion of the court at the Special Term, adopted at the Appellate Division (166 App. Div. 251, 256), with the findings and conclusions of law, it appears that it was the intention of the court to hold that the facts found would not justify a judgment in favor of the plaintiffs except so far as the defendants discriminated against the plaintiffs' mill and refused to handle the plaintiffs' material while at the same time continuing to handle material from other non-union mills.

The court say: "The strike committee having decided that plaintiffs' shop carpenter work is obnoxious to its organization, and having a right to refuse to work with or without giving any reason, here maintains that it may strike against the material made by plaintiffs but for a time suffer their non-union rivals to continue their production, at least until after plaintiffs' mill shall be reduced to submission. Thereby the labor organization may be said to act affirmatively and aggressively, as the damage to the good will and business of the plain-

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tiffs is the specific object aimed at, the direct result sought. Granted that the selection of the plaintiffs was made with no personal hostility, and was an act to affect ultimately the whole body of non-union mill owners, the destructive result to the plaintiffs is not mitigated."

We do not think that the conclusion of the court is sustained by the findings of fact in the case. A judgment was, however, entered, the affirmative provisions of which are quoted herewith, preceding the opinion. The first paragraph thereof adjudges that the defendants shall not send to any customer or prospective customer of the plaintiffs any letter, circular or communication, printed, written or oral, which in terms or by inference suggests that labor troubles will follow the use of materials purchased from plaintiffs or from any person, firm or corporation declared unfair or whose material does not bear the union label. Upon all the findings before us it is clear that the "labor troubles" therein referred to, simply mean that if non-union made materials are used the members of the Brotherhood will refuse to install the same.

The second paragraph thereof adjudges that the defendants shall not direct, require or compel any person by by-law, rule or regulation or any act thereunder to cease working for another because they use material purchased from non-union shops. And the third paragraph thereof enjoins the defendants from inducing any workmen in their trades to quit work on any building because non-union carpenters are there employed to install material which comes from non-union shops. All of the acts enjoined are under the findings of fact in this case lawful acts done for lawful purposes.

We think that the rules laid down by this court in the *National Protective Association* case require a reversal of the judgment in favor of the plaintiffs upon the findings before us. When it is determined that a labor organiza-

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tion can control the body of its members for the purpose of securing to them higher wages, shorter hours of labor and better relations with their employers, and as a part of such control may refuse to allow its members to work under conditions unfavorable to it, or with workingmen not in accord with the sentiments of the labor union, the right to refuse to allow them to install non-union made material follows as a matter of course, subject to there being no malice, fraud, violence, coercion, intimidation or defamation in carrying out their resolutions and orders.

Voluntary orders by a labor organization for the benefit of its members and the enforcement thereof within the organization is not coercion. The members of the organization as we have already stated who are not willing to obey the orders of the organization are at liberty to withdraw therefrom. The bounds beyond which an association of employees may not as a general rule go in controlling its members in their dealings with employers are not easily determined. They cannot at least extend beyond a point where its or their direct interests cease. There is a material difference in the power of an association so far as it affects its primary or secondary interest. Where the acts of an employee or employees in their individual or associate capacity are reasonably and directly calculated to advance lawful objects, they should not be restrained by injunction.

A strike or boycott may be legal or illegal according to the acts involved therein (*Gray v. Building Trades Council*, 91 Minn. 171; *State v. Van Pelt, supra*; *Gill Engraving Co. v. Doerr*, 214 Fed. Rep. 111; *Mills v. U. S. Printing Co.*, 99 App. Div. 605; affd., 199 N. Y. 76. See, also, opinion of ANDREWS, J., in *Seubert, Inc., v. Reiff*, 98 Misc. Rep. 402), so an action for a direct and primary purpose in the interest of individuals or a combination of individuals taken in good faith to advance the interest of the individuals or combination

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may be lawful, while a remote and secondary action which carries with it a degree of malice as a matter of law is illegal. In the case now before us if the defendants had called upon the public generally to discontinue using the plaintiffs' material and had sought to prevent all persons by communications, written or otherwise, from dealing with the plaintiffs, their acts would have been illegal.

It does not appear from the record that the defendants in any way interfered with the trade or business of the plaintiffs, except that the members of the Brotherhood were by their voluntary action required to decline using material made in non-union shops and announcement was made of such intention that the same might be known by contractors in advance of the contracts to be entered into in connection with the erection of the work. Such action of the defendants did not extend beyond such refusal to install non-union made material and so far as it amounted to either a strike or a boycott, it directly affected the Brotherhood and its members.

An examination of the many cases called to our attention by the plaintiffs will show that in most instances the acts criticized and condemned were not directly connected with the purpose sought to be conserved by the defendants therein. A few of such cases are as follows: *Loewe v. Lawlor* (208 U. S. 274); *Bailey v. Assn. of Master Plumbers* (103 Tenn. 99; S. C., 52 S. W. Rep. 853); *Rocky Mountain Bell Telephone Co. v. Montana Fed. of Labor* (156 Fed. Rep. 809); *Barnes v. Chic. Typ. Union* (232 Ill. 424); *Iron Moulders Union v. Allis-Chalmers Co.* (166 Fed. Rep. 45).

The judgment of the Appellate Division should be reversed and the complaint dismissed, with costs in all courts.

COLLIN, HOGAN, CARDOZO, POUND and ANDREWS, JJ., concur; CRANE, J., takes no part.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HARRY J. MOSS et al., Appellants, *v.* THE BOARD OF SUPERVISORS OF ONEIDA COUNTY, Respondent.

Appeal — provision of statute (Code Civ. Pro. § 190, amd. L. 1917, ch. 290) authorizing appeal to Court of Appeals when constitutional question is involved — construction of statute (County Law, § 240, subds. 16, 18) that costs and expenses of county officer removed by governor are not county charges, not appealable.

1. Under the clause of section 190 of the Code of Civil Procedure (as amended by chapter 290 of Laws of 1917) which authorizes an appeal to the Court of Appeals where there is directly involved a constitutional question, there must be presented directly and primarily an issue determinable only by the construction by this court of the Constitution of the state or of the United States.

2. An appeal will not lie where the primary and direct question presented and decided by the Appellate Division, was "Whether the statute under consideration (County Law [Cons. Laws, chap. 11], § 240, subds. 16, 18) meant or intended that the costs and expenses of a county officer who was removed by the governor on charges should be a county charge."

People ex rel. Moss v. Bd. of Supervisors, 178 App. Div. 716, appeal dismissed.

(Argued October 2, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 26, 1917, which affirmed, on certiorari, a determination of the board of supervisors of Oneida county.

The facts, so far as material, are stated in the opinion.

G. C. Morehouse for appellants.

H. N. Harrington for respondent. The Court of Appeals has no jurisdiction to hear this appeal. (Code Civ. Pro. §§ 190, 191; L. 1917, ch. 290; N. Y. Const. art. 6, § 2; *Haroun v. B. E. Light Co.*, 152 N. Y. 212; *People ex rel. v. Barker*, 152 N. Y. 417.)

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COLLIN, J. The board of supervisors of Oneida county determined in May, 1916, that claims of the relators upon the county were not legal and should not be audited. Those claims were for the costs and expenses of the relator Moss in proceedings before the governor of the state for his removal as sheriff of the county upon charges preferred against him. He was removed by the governor. The relator O'Connor was his attorney. The Appellate Division, on certiorari, unanimously affirmed the determination by the order entered May 26, 1917, from which this appeal was taken as of right June 4, 1917.

The law did not permit the appeal. Chapter 290 of the Laws of 1917, taking effect June 1, 1917, amended section 190 of the Code of Civil Procedure to read, in so far as is relevant here: "From and after the 31st day of May, 1917, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of an actual determination made by an appellate division of the supreme court in either of the following cases, and no others. 1. An appeal may be taken as of right to said court from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding where is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification. 2. * * *. 3. * * *. 4. * * *. The provisions of this section shall not apply to an appeal taken to the court of appeals prior to the first day of June, nineteen hundred and seventeen, but an appeal so taken shall be heard and determined under existing provisions of law."

It is obvious the appeal is unwarranted, by virtue of the legislative limitation, unless, as the appellants assert, the proceeding directly involved the construction of the

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Constitution of the state. The claims of the relators were based wholly upon a statute (County Law [Cons. Laws, ch. 11], section 240, subdivisions 16, 18). The record here discloses that the determination of the board of supervisors and the decision of the Appellate Division went upon the ground that the statute neither declared nor intended that the costs and expenses of the officer who was removed upon the charges should be a county charge. Neither the one nor the other involved the construction of the Constitution of the state. The primary and direct question presented and decided was, did the statute mean or intend that the costs and expenses of an unsuccessful defense by the officer should be a county charge. It involved the meaning and not the validity of the statute. It was determined in the negative by the unanimous decision of the Appellate Division. We would reach and consider the constitutionality of the statute only through and after a review and reversal of the decision. The affirmance of it would leave the validity of the statute unconsidered. In a certain sense, perhaps, each enforcement of a statute by a court involves its constitutionality or the construction of the Constitution of the state. That sense, however, was not within the legislative mind or intention in enacting the present restriction of our jurisdiction. An appeal, upon the ground asserted here, must present to us directly and primarily an issue determinable only by our construction of the Constitution of the state or of the United States. (See *Empire State-Idaho Mining & D. Co. v. Hanley*, 205 U. S. 225; *City of Cairo v. Bross*, 99 Ill. 521.)

The appeal should be dismissed, with costs.

HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO, McLAUGHLIN and CRANE, JJ., concur.

Appeal dismissed

THE FIFTH AVENUE BUILDING COMPANY, Appellant, *v.*
J. FREDERIC KERNOCHAN, as Executor of EDWARD
M. KNOX, Deceased, Respondent.

Landlord and tenant — action for rent — lease of premises which included vault under sidewalk — when exclusion of tenant from such vault by municipal authorities is partial eviction of tenant and constitutes defense in action for rent.

1. Changes in arrangement or in the division of sections of a statute will not work a change of meaning unless the intent to change is manifest. That principle applies with special force to consolidating statutes.

2. The rule that a covenant for quiet enjoyment will be read into a lease has become a settled rule of property and is not changed by the provisions of the Real Property Law.

3. This action is for rent of premises where the terms of the lease included a vault under a sidewalk which was maintained under a revocable lease from the city of New York. The city revoked the license and excluded the tenant from the vault, first from the whole vault and later from part of it. The defense is a partial eviction, with a demand that the rent abate in proportion to the diminished rental value. The landlord insists that in the absence of a covenant for quiet enjoyment, eviction is not a defense. *Held*, that eviction as a defense to an action for rent does not depend upon such a covenant, either express or implied; that an actual eviction suspends the obligation of payment either in whole or in part because it involves a failure of the consideration for which rent is paid.

4. The space within the highway was more than an incident or an appurtenance. It was the subject-matter of the grant. Hence it was also the subject-matter of the covenant, and the inference is not permissible that ouster by the city was by implication excepted from the covenant.

Fifth Ave. Building Co. v. Kernochan, 178 App. Div. 19, affirmed.

(Argued October 3, 1917; decided October 16, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 18, 1917, which affirmed an order of Special Term overruling a demurrer to the answer.

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Points of counsel.

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The following questions were certified: "1. Is there an implied covenant for quiet enjoyment in the lease set forth in the pleadings in this action? 2. Are the defenses and counterclaims in the defendant's answer sufficient in law upon the face thereof?"

The nature of the action and the facts, so far as material, are stated in the opinion.

William Greenough and *Carroll G. Walter* for appellant. No covenant for quiet enjoyment can be implied in this case even if such implication be not forbidden by statute (*Wagner v. Van Schaick Realty Co.*, 163 App. Div. 632; *Gallup v. Albany Railway*, 7 Lans. 471; 65 N. Y. 1; *Bence v. F. Nat. Bank*, 79 N. Y. 154; *Churchward v. Queen*, L. A. 1 Q. B. 173; *Zorkowski v. Astor*, 156 N. Y. 393; *McAdam on Landl. and Ten.* [3d ed.] 374, § 118; *Burr v. Stenton*, 43 N. Y. 462; *Thorley v. Pabst Brewing Co.*, 179 Fed. Rep. 338.) The implication of a covenant for quiet enjoyment is expressly forbidden by the Real Property Law. (*Mack v. Patchin*, 42 N. Y. 167; *Kinney v. Watts*, 14 Wend. 38; *Tone v. Brace*, Clarke's Ch. 503; *Mayor, etc., v. Mabie*, 13 N. Y. 153; *People v. Westervelt*, 17 Wend. 674; *Vernam v. Smith*, 15 N. Y. 327; *Edgerton v. Page*, 20 N. Y. 281; *Graves v. Berdan*, 26 N. Y. 498; *Burr v. Stenton*, 43 N. Y. 462; *Boreel v. Lawton*, 90 N. Y. 293.) The deprivation of possession of the "vault space" having been brought about by the lawful act of the public authorities in revoking the license under which the "vault space" was held, it does not amount to a breach of a covenant for quiet enjoyment. (*Franklin Bldg. Co. v. Finn*, 165 App. Div. 469; *Duhain v. M. J. & K. Jewelry Co.*, 211 N. Y. 364; *Sparrow v. Kingman*, 1 N. Y. 242; *Thompson v. Simpson*, 128 N. Y. 270; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685.)

John Burlinson Coleman for respondent. The defenses pleaded are sufficient in law. (*Times Square Imp. Co.*

v. *Fleischmann's V. M. Bakery*, 173 App. Div. 633; *Hoffman v. Murray*, N. Y. L. J., March 27, 1913; 159 App. Div. 904; 216 N. Y. 750; *Duhain v. Mermod, J. & K. J. Co.*, 211 N. Y. 364.) A covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land by whatever form of words the agreement is made. (*Mayor, etc., v. Mabie*, 13 N. Y. 151; *Vernam v. Smith*, 15 N. Y. 327; *Mack v. Patchin*, 42 N. Y. 167; Taylor on Landl. & Ten. [9th ed.] 367, § 304; McAdam on Landl. & Ten. [4th ed.] 429, § 125; Chaplin on Landl. & Ten. 132, § 170.) The rule that a covenant for quiet enjoyment is implied in every lease has not been changed by the adoption of the present Real Property Law. (*Mack v. Patchin*, 42 N. Y. 167.)

CARDOZO, J. The action is for rent. The plaintiff leased to the defendant's testator part of the first floor and basement of the Fifth Avenue Building in the city of New York. By the terms of the lease, the basement included a vault beneath the sidewalk. This vault was in fact maintained under a revocable license from the city of New York. During the term of the lease, the city revoked the license, and excluded the tenant, at first from the whole vault, and later from part of it. The rent in suit accrued during the period of exclusion. The defense is a partial eviction with a demand that the rent abate in proportion to the diminished rental value. The lease contains no express covenant for quiet enjoyment. The landlord insists that in the absence of such a covenant, eviction is no defense. We do not share that view.

Eviction as a defense to a claim for rent does not depend upon a covenant for quiet enjoyment, either express or implied. It suspends the obligation of payment either in whole or in part, because it involves a failure of the consideration for which rent is paid (*Royce v. Guggenheim*,

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106 Mass 202; *Morse v. Goddard*, 13 Metc. 179; *O'Brien v. Ball*, 119 Mass. 28; *Lodge v. Martin*, 31 App. Div. 13, 14; *Lawrence v. French*, 25 Wend. 443; *Pendleton v. Dyett*, 4 Cow. 581, 583; 8 Cow. 727, 730; 18 Halsbury Laws of England, Landlord and Tenant, 479, 480, 482; Cruise Dig., title 28, ch. 3, sec. 1; Bacon Abridg., Rent L.; Woodfall Landlord & T. [19th ed.] 478, 486). We are dealing now with an eviction which is actual and not constructive. If such an eviction, though partial only, is the act of the landlord, it suspends the entire rent because the landlord is not permitted to apportion his own wrong. If the eviction is the act of a stranger by force of paramount title, the rent will be apportioned, and a recovery permitted for the value of the land retained (*Christopher v. Austin*, 11 N. Y. 216; *Blair v. Claxton*, 18 N. Y. 529; *Duhain v. Mermod, J. & K. J. Co.*, 211 N. Y. 364; *Royce v. Guggenheim, supra*). The right to an abatement of the rent in such circumstances does not grow out of the covenant for quiet enjoyment. It has been enforced in cases where there was no breach of any covenant (*Gates v. Goodloe*, 101 U. S. 612, 619; *Gillespie v. Thomas*, 15 Wend. 464; *Lodge v. Martin, supra*, and cases there cited). In the days of common law pleading, it was the subject of a plea in bar (*Pendleton v. Dyett, supra*; *Smith v. Shepard*, 15 Pick. 147, 149). A covenant for quiet enjoyment, either express or implied, is essential where eviction by title paramount is the subject of a claim for damages. It is not essential where the tenant asserts a failure, either complete or partial, of the consideration for the rent. *Carter v. Burr* (39 Barb. 59) neatly illustrates the distinction. There a lease had been made in fee. Such a lease, unlike one for years, was held to be a conveyance of real estate, and no covenant was implied. For that reason, the tenant's claim for damages as the result of a partial eviction was rejected, but none the less he was held to be entitled to an abatement of the rent.

The landlord is also in error in its contention that the implication of a covenant for quiet enjoyment is now prohibited by law. At the date of this lease, the Real Property Law of 1896 (L. 1896, ch. 547) was in force. By section 216 (now section 251; Cons. Laws, ch. 50), "a covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not." This provision is a re-enactment with immaterial verbal changes of a provision of the Revised Statutes (1 R. S. 738, sec. 140). The Statutory Revision Commission state in their notes that the section is unchanged in substance. It is settled law that the corresponding section of the Revised Statutes was not applicable to leases which created estates for years (*Mayor, etc., of N. Y. v. Mabie*, 13 N. Y. 151, 153; *Vernam v. Smith*, 15 N. Y. 327; *Graves v. Berdan*, 26 N. Y. 498; *Mack v. Patchin*, 42 N. Y. 167; *Burr v. Stenton*, 43 N. Y. 462). It was restricted to conveyances of real estate, and real estate was defined in the same chapter as equivalent to lands, tenements and hereditaments. Those words, it was held, did not include a chattel real (*Mayor, etc., of N. Y. v. Mabie, supra*). That definition of real estate is preserved in the present statute (Real Prop. Law, sec. 2). The argument is made, however, that the Real Property Law has established a new definition of a "conveyance." By section 205 of the act of 1896 (sec. 240 of the present act, L. 1909, ch. 52; Cons. Laws, ch. 50), "the term 'conveyance,' as used in this article, includes every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered," and "the terms 'estate' and 'interest in real property' include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent." This definition, however, is not new. All that is new about it is its location. In its substance it is a re-enactment of a

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provision of the Revised Statutes (2 R. S. 137, secs. 6, 7). It is there included in the Statute of Frauds. The Statute of Frauds, which in the Revised Statutes made up a separate article, has now been transposed and consolidated with other articles. The result has been to place its provisions, including its definition of a conveyance, in the same article which forbids the implication of a covenant in a conveyance of real property.

We do not think that this transposition of sections has effected a change of meaning (Fowler Real Prop. L. sec. 251, note). The Revised Statutes distinguished sharply between conveyances of real estate and conveyances of interests in real estate. We find the distinction emphasized in the very sections from which the present definition of conveyances has been borrowed (2 R. S. 137, secs. 6, 7): "lands" were coextensive in meaning with "lands, tenements and hereditaments;" "estates and interests in lands" might embrace a chattel real. The same distinction is preserved to-day (Real Prop. Law of 1896, secs. 2 and 205; Real Prop. Law of 1909, secs. 2 and 240). When this distinction is kept in mind, the meaning of the statute is no longer doubtful. The prohibition of implied covenants is still applicable, not to conveyances generally, nor to conveyances of "interests in real property," but solely to conveyances of real property, *i. e.*, of lands, tenements and hereditaments. If the purpose had been to extend the prohibition to implied covenants in leases, it would have been very easy to say so in terms too clear for misconstruction. The re-enactment of the old section was an adoption of the meaning which it had acquired by judicial construction for more than half a century (*Davis v. Davis*, 75 N. Y. 221; *Caesar v. Bernard*, 156 App. Div. 724, 732; 209 N. Y. 570; *Jay v. Johnstone*, 1893, 1 Q. B. 25, 28; *Comm. v. Hartnett*, 3 Gray, 450, 451). Changes in arrangement or in the division of sections will not work a change of

meaning unless the intent to change is manifest (*Davis v. Davis, supra*). That principle applies with special force to consolidating statutes (*Mitchell v. Simpson*, 25 Q. B. D. 183, 190). It finds its proper application here. The rule that a covenant for quiet enjoyment will be read into a lease has become a settled rule of property. We cannot believe that the legislature would have overthrown such a rule without clearer token of its purpose. It would not have retained the old phrases, and left a change of meaning to be gathered by doubtful inference from the order of the sections. More significant than anything which it did change are the things which it omitted to change. The ancient landmarks have been preserved.

Any other conclusion would lead indeed to strange anomalies. A covenant for quiet enjoyment will be implied in oral leases. It results from the mere relation of the parties (*Markham v. Paget*, 1908, 1 Ch. 697; *Budd-Scott v. Daniell*, 1902, 2 K. B. 351; *Dexter v. Manley*, 4 Cush. 14; Rawle Covenants of Title, sec. 274). But the statutory definition of conveyances is limited to instruments in writing (Real Prop. L. sec. 205, now sec. 240). The landlord, therefore, would have us hold that the covenant is implied when the lease is oral and rejected when the lease is written. Such a distinction, if it is to be made, must rest upon a clearer manifestation of the legislature's purpose.

One other argument in support of the landlord's claim remains to be considered. The tenant, it is said, was chargeable with knowledge that the landlord's occupation of the highway was by force of a revocable license (*Deshong v. City of N. Y.*, 176 N. Y. 475). From this imputed knowledge, the consequence is deduced that ouster by the city was by implication excepted from the covenant, and that the tenant, having taken his chances, must continue to pay the rent. But the language of the

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lease repels that view of the relation. It is all a question of intention, and here the intention is unmistakable. The vault and the rest of the basement are joined in a single description; and the whole is leased to the tenant for a term of ten years. Nothing in the lease suggests a distinction between the landlord's duties in respect of one part and his duties in respect of others. We cannot doubt that the enjoyment of the whole was the consideration for the rent. The purpose could hardly have been clearer if the vault had been leased alone. The space within the highway was more than an incident or an appurtenance. It was the subject-matter of the grant. Being the subject-matter of the grant, it was also the subject-matter of the covenant (*Pabst Brewing Co. v. Thorley*, 145 Fed. Rep. 117; 179 Fed. Rep. 338).

In thus holding, we place the incidence of loss where justice requires it to fall. Without warning the tenant of the chance of revocation, the landlord undertook to make a lease which should continue for a fixed term. We will not whittle down the consequences that normally attach to such a letting by nice assumptions of constructive notice. The tenant had the right to take the landlord at his word. Whether the paramount title be public or private, the consequence of ouster is a suspension of the rent.

The order should be affirmed with costs, and the questions certified answered in the affirmative.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN and CRANE, JJ., concur.

Order affirmed.

In the Matter of the Claim of JOSEPH KAMMER,
Respondent, *v.* EDITH A. HAWK et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Workmen's Compensation Law — when superintendent of apartment house not entitled to compensation for injuries caused by fall of a radiator which he was moving.

The lifting of a radiator to connect it up for heating purposes is not heating engineering nor the installation and covering of pipes or boilers within the meaning of group 42 of section 2 of the Workmen's Compensation Law (Cons. Laws, chap. 67), as it existed January, 1916, and hence the superintendent and general repairman of an apartment house injured by the fall of a radiator, which he was moving from a storeroom to an apartment, is not entitled to compensation for such injury occurring before that date. (*Matter of Schmidt v. Berger*, 221 N. Y. 26, followed.)

Matter of Kammer v. Hawk, 177 App. Div. 938, reversed.

(Argued October 4, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 16, 1917, affirming an award of the state industrial commission under the Workmen's Compensation Law.

The facts, so far as material, are stated in the opinion.

Joseph F. Murray and Robert M. McCormick for appellants. The claimant was not an employee within the contemplation of the Workmen's Compensation Law. (*Sheridan v. Groll Const. Co.*, 218 N. Y. 633; *Chappelle v. Four Hundred Twelve Broadway Co.*, 218 N. Y. 632; *McIntyre v. Hilliard Hotel Co.*, 218 N. Y. 642; L. 1916, ch. 622; *Bargey v. M. M. Co.*, 218 N. Y. 410; *Mulford v. Pettit*, 220 N. Y. 540; *Schmidt v. Berger*, 221 N. Y. 26; *Siegfried v. Goldberg*, 220 N. Y. 673.) The work being performed by the claimant at the time of his injury does not constitute the hazardous occupation

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of "heating engineering." (*Schmidt v. Berger*, 221 N. Y. 26; *Matter of Sheridan v. Groll Const. Co.*, 218 N. Y. 633; *Matter of Heitz v. Ruppert*, 218 N. Y. 148; *Matter of Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410.)

S. John Block for claimant, respondent. The employer was operating an apartment house as a business and for profit, and in connection with said business the claimant was injured while engaged in work incidental to heating engineering, work classified as hazardous under the Workmen's Compensation Law (group 42). The award was properly made. (*Matter of Mulford v. Pettit & Sons*, 220 N. Y. 540; *Matter of Glatzl v. Stumpf*, 220 N. Y. 71; *Herbert v. Shanley Co.*, 242 U. S. 591.)

Merton E. Lewis, Attorney-General (*E. C. Aiken* of counsel), for State Industrial Commission, respondent.

CRANE, J. Edith A. Hawk was the owner of an apartment house at No. 150 West Eightieth street, borough of Manhattan, New York city. The claimant was superintendent and general repairman of the building. His duties were to make such general carpentering and plumbing repairs as he was able to make and to operate the boilers which supplied the steam heat to the premises. The owner operated this steam heating plant for profit included in the rents paid by the tenants. On January 19, 1916, Kammer went into the storeroom in the basement to obtain a radiator to be put in an apartment for one of the tenants who had complained that the apartment was cold. His purpose was to get the radiator and to connect it up with the heating apparatus so that the apartment might thereby be supplied with heat. In lifting the radiator from a lot of other radiators located in the storeroom, the radiator tumbled over and fell upon his right great toe crushing

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the same. For this injury he has been awarded compensation by the state industrial commission and the Appellate Division has affirmed the award.

Was the employee at the time of injury engaged in any employment or work covered by the Compensation Law?

Group 42 of section 2, as it existed in January, 1916 (Cons. Laws, ch. 67; L. 1914, ch. 41) specified "plumbing, sanitary or heating engineering; installation and covering of pipes or boilers." The lifting of a radiator to connect it up for heating purposes was not heating engineering nor the installation and covering of pipes or boilers. That such work was not included within these terms is evident from the amendment to the law passed subsequently and in the same year. (L. 1916, ch. 622.) Group 42 was amended so as to read "plumbing, sanitary lighting or heating installation or repair;" and the word "engineering" was dropped. So, too, group 22 was amended by the same act to include "heating and lighting." The words "maintenance and care of buildings" were not added to group 42 until 1917. (L. 1917, ch. 705.)

The claimant cannot recover for reasons similar to those expressed in *Matter of Schmidt v. Berger* (221 N. Y. 26).

The order of the Appellate Division should be reversed and the claim dismissed, with costs in this court and in the Appellate Division to the appellants against the state industrial commission.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDENZO and McLAUGHLIN, JJ., concur.

Order reversed, etc.

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In the Matter of the Application of JOHN OSSMAN,
as Trustee under the Will of WILHELM KLUMPF,
Deceased, Respondent, *v.* SUSAN VON ROEMER et al.,
Appellants.

Will — trust estate for benefit of testator's daughter and her children — will construed and held that, the daughter and children being dead, the remainder had vested in the children and passed to their father.

Testator devised his real estate to his executors as trustees to receive the rents and income thereof and, after payment of taxes and expenses, to pay to his widow, annually, one-third of such income, and to divide the remaining two-thirds thereof equally among his daughter and two sons. By a subsequent clause testator directed that after the death of his wife, the net income of the one-third part of his real estate, which had been paid her, should be paid to his daughter during her lifetime and that upon her death, if she left issue her surviving, such third part of the principal should be paid over to her issue, when such issue attained the age of twenty-one years, and until such issue should become twenty-one years of age the net income of said one-third part of his real estate should be used for their maintenance and education. Testator further provided that "Should, however, my daughter die without leaving lawful issue her surviving, or should all of such issue, if any, die before attaining the age of twenty-one years, then, the said one-third part of my real estate, also the share of the income of my real estate directed to be paid to my daughter during the lifetime of my wife, shall be paid over and divided equally, share and share alike, among her then surviving brothers," and if either brother was then dead, among his issue. Testator's wife is still living, but his daughter died about nine years after his death, leaving three children, all of whom reached the age of twenty-one years and all of whom have since died leaving their father as their sole surviving heir at law and next of kin. Held, upon examination and construction of testator's will, that when the daughter's children attained the age of twenty-one years, survivorship ceased to be a condition, their remainders became vested and their estates passed to their heirs, and, hence, the issue of testator's sons cannot take under the will, and the husband of testator's daughter, as the only surviving heir at law and next of kin of her

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children, has succeeded to their rights and is now the person presumptively entitled to the next eventual estate, and, therefore, that the income thereof goes to him.

Matter of Klumpf, 177 App. Div. 910, affirmed.

(Argued October 4, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 2, 1917, which affirmed a decree of the New York County Surrogate's Court construing the will of Wilhelm Klumpf, deceased.

The facts, so far as material, are stated in the opinion.

Patrick L. Ryan and *William Brunner* for appellants. Susan, the daughter of the testator, did not take a vested interest in the income of the estate. No part of the income could pass to her next of kin. (*Manice v. Manice*, 43 N. Y. 385; *Delafield v. Shipman*, 103 N. Y. 463.) The income from Susan's share of existing trust estate goes to the next eventual estate, pursuant to statute. (*Gould v. Rutherford*, 79 Hun, 281; *Manice v. Manice*, 43 N. Y. 303; *Matter of Harteau*, 125 App. Div. 713; 204 N. Y. 300.) The intention of the testator in disposing of his property prevails, in determining the persons presumptively entitled to the next eventual estate, unless legally prohibited. (*Clark v. Cammann*, 160 N. Y. 315; *Salter v. Droune*, 205 N. Y. 212.) The testator's language indicates the clear intention that there shall be no final vesting of interests during the existence of the first trust. The gift to survivors of classes of beneficiaries, to take effect after the termination of the first trust, is of controlling significance. (*Matter of Crane*, 164 N. Y. 71; *Salter v. Droune*, 205 N. Y. 216; *Clark v. Cammann*, 160 N. Y. 315; *Matter of Schlereth v. Schlereth*, 173 N. Y. 444; *Matter of Pulis*, 220 N. Y. 196; *Fulton Trust Co. v. Phillips*, 218 N. Y. 573.) The law favors that construction which permits descent to remain

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in the line of ancestral blood. (*Matter of Boyce*, 37 Misc. Rep. 146; *Clark v. Cammann*, 160 N. Y. 315; *Scott v. Guernsey*, 48 N. Y. 106; *Knowlton v. Atkins*, 134 N. Y. 313; *McQuinn v. Hardenbrook*, 54 N. Y. 83; *Low v. Harmony*, 72 N. Y. 408; *Matter of Manning*, 50 App. Div. 407; *Byrnes v. Stillwell*, 103 N. Y. 460; • *Matter of Miller*, 18 App. Div. 211; 155 N. Y. 645.) The next eventual estate is held by the surviving grandchildren of the testator, and they are, therefore, entitled to Susan's share of the income. (*Van Emburgh v. Ackerman*, 3 Redf. 501; *Delafield v. Shipman*, 103 N. Y. 463; *Matter of Harteau*, 204 N. Y. 300; *Matter of Tompkins*, 154 N. Y. 646.)

George V. Grainger for petitioner, respondent. The interest of Susan Weber under decedent's will passed to her representative, Conrad Weber. (Jessup's Redf. on Surr. Courts, 1390; Code Civ. Pro. § 2672.) Each grandchild of the decedent took a vested interest upon testator's death with open and let in for afterborn grandchildren. (*Goebel v. Wolf*, 113 N. Y. 405; *Livingston v. Greene*, 52 N. Y. 118; *Matter of Russell*, 168 N. Y. 178; *Stevenson v. Lesley*, 70 N. Y. 512; *Embry v. Sheldon*, 68 N. Y. 227; *Cammann v. Bailey*, 210 N. Y. 19; *Kent v. Church of St. Michael*, 136 N. Y. 10; *Dosher v. Wyckoff*, 132 App. Div. 143; *Matter of Van Kleeck*, 95 Misc. Rep. 40; *Chamberlain v. Taylor*, 105 N. Y. 192; *Cook v. Platt*, 98 N. Y. 35.) The words of gift as contained in the will of the decedent to his grandchildren are immediate and the enjoyment and possession alone were suspended. (*Matter of Crane*, 164 N. Y. 71; *Matter of Tienken*, 131 N. Y. 391; *Fulton Trust Co. v. Phillips*, 218 N. Y. 573.)

Lewis S. Goebel and *Lorlys Elton Rogers* for August Weber et al., as committee of the estate of Conrad Weber, respondent. As Susan Weber survived the testator she

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took a vested interest in one-third of two-thirds of the income during the lifetime of the widow, which vested interest has now passed to Conrad Weber. (*Montague v. Montague*, 29 App. Div. 377; *Reynolds v. Collins*, 3 Hill, 441; *McGillis v. McGillis*, 154 N. Y. 532; *Williamson v. Field*, 2 Sandf. Ch. 552; *Sheridan v. House*, 4 Keyes, 587; *Hennessy v. Patterson*, 85 N. Y. 104; *Moore v. Lyons*, 25 Wend. 144; *Livingston v. Greene*, 52 N. Y. 118; *Matter of Russell*, 168 N. Y. 175; *Riker v. Gwynne*, 201 N. Y. 143.) The words of gift as contained in the will of the decedent to his grandchildren are immediate and the enjoyment and possession alone were suspended. (*Matter of Tienken*, 131 N. Y. 391; *Fulton Trust Co. v. Phillips*, 218 N. Y. 573; *Moore v. Lyons*, 25 Wend. 119; *Matter of Farmers' Loan & Trust Co.*, 86 Misc. Rep. 164; *Trowbridge v. Coss*, 126 App. Div. 679; 195 N. Y. 596; *Connelly v. O'Brien*, 166 N. Y. 406; *Matter of Houser's Estate*, 149 N. Y. Supp. 598.)

CARDOZO, J. This is a proceeding for the construction of a will (Code Civ. Pro. sec. 2615).

The testator gave his residuary estate to trustees upon the following trusts: "Third. * * * To take, collect and receive the rents, income, issues and profits of the same," and after the payment of taxes and expenses "to apply the residue of the same as follows, viz.: To pay over and to apply to the use of my wife Anna Maria Klumpf, *née* Emmer, for and during the residue of her natural life and at the end of each and every year, one third part thereof, and to divide the remaining two-thirds parts thereof equally, among my said three children, Susan Weber, Adam Klumpf and William Klumpf, for and during the term of the natural life of my said wife. * * * Fourth. After the decease of my said wife, I order and direct my said trustees to pay over and apply the net rents, income,

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issues and profits of one-third part of my said real estate to the use of my daughter, Susan Weber, for and during the term of her natural life. Upon the death of my said daughter leaving lawful issue her surviving I direct my said trustees to pay over and divide the said one-third part of the principal of my said real estate, to and among her lawful issue, equally, share and share, alike, as soon as such issue attains the age of twenty-one years, respectively, and until such issue attains the age of twenty-one years, respectively, I direct my said trustees to apply so much of the net rents, income, issues and profits of said one-third part of my said real estate, to the use of such issue, for its proper support, maintenance and education, as my trustees may deem proper or necessary. Should one or more of the children of my daughter die before attaining the age of twenty-one years, then her surviving children shall receive the share of the child or children so dying. Should, however, my daughter die without leaving lawful issue her surviving, or should all of such issue, if any, die before attaining the age of twenty-one years, then the said one-third part of my real estate, as also the share of the income of my real estate directed to be paid to my daughter during the life-time of my wife, shall be paid over and divided, equally share and share alike, among her then surviving brothers; should either of said brothers have died leaving lawful issue him surviving then such issue shall receive the share its parent would have taken if living."

Later clauses of the will (the fifth and sixth subdivisions) deal with the shares of the two sons, Adam and William, and follow a like plan.

The testator died in 1883. His wife is still living. The daughter Susan died in 1892. She left three children. All three reached the age of twenty-one years. All three have since died intestate. Their sole surviving heir at law and next of kin is their father, Conrad Weber.

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The question to be determined is the disposition of the income until the trust shall be terminated by the death of the testator's wife.

The surrogate held that the daughter Susan took a vested interest in the income of two-ninths of the estate, not merely for her own life, but for the life of her mother; that on her death before her mother, this interest passed to her personal representatives; and that the income is now payable to her husband, Conrad Weber. Our view is that on the death of Susan Weber her interest in the income ceased; that the income then became payable to the person or persons presumptively entitled to the next eventual estate; and that the person presumptively so entitled at the present time is Conrad Weber as the successor in interest of his children. We thus reach the same conclusion as the surrogate, but by a different path.

That Susan Weber's interest in the income did not outlast her death is established by *Delafield v. Shipman* (103 N. Y. 463). There are other cases of like tenor (*Matter of Tompkins*, 154 N. Y. 634, 646; *Matter of Viele*, 35 App. Div. 211; *Staples v. Mead*, 152 App. Div. 745, 751; *Young v. Barker*, 141 App. Div. 801, 806; *Gould v. Rutherford*, 79 Hun, 281; *Manice v. Manice*, 43 N. Y. 303, 385, 386). The undisposed of income passed upon her death under section 63 of the Real Property Law to the persons presumptively entitled to the next eventual estate. Cases are cited by counsel in which gifts of income have been held to pass to the representatives of the primary beneficiary (*Montanye v. Montanye*, 29 App. Div. 377; *Morgan v. Williams*, 66 How. Pr. 139). Whether they were correctly determined, we do not now consider. We do not need to go into possible distinctions between the rights of annuitants (*Savery v. Dyer*, 1 Amb. 139) and those of beneficiaries under the statutory express trusts. It is enough to say that whenever the right to income was

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continued in the executors until the division of the estate, the court discerned nothing in the will inconsistent with that purpose. Here a contrary purpose is unmistakably revealed. It is revealed in the direction which we find in the fourth subdivision that Susan's income shall be applied to her use during her life. It is revealed in the entire scheme of the will which plainly involves the substitution of her children as her successors in interest upon her death. Her death was intended to mark the limit of her right.

The question remains, however, who is now presumptively entitled to the next eventual estate? While Susan's children were alive, they answered that description. Now that they are dead, it becomes necessary to determine whether their interests as remaindermen were vested, or contingent upon survivorship at the termination of the trust. We think that when they attained the age of twenty-one years, survivorship ceased to be a condition, their remainders became vested, and their estates passed to their heirs. It is true the only gift is found in a direction to pay and divide upon majority. In the event of death before that time, there is a gift over to others. Up to that time, the remainder may have been contingent. If that is so, the contingency ceased when majority was attained (*Fulton Trust Co. v. Phillips*, 218 N. Y. 573). The conditions on which the right to division depended were then satisfied. The right was then perfect. Only the outstanding trust for the widow has postponed its enjoyment.

To hold otherwise would ignore the principle of construction which favors the vesting of estates (*Hersee v. Simpson*, 154 N. Y. 496). It would ignore also the avowed struggle of courts to escape even partial intestacy (*Meeks v. Meeks*, 161 N. Y. 66, 71). The appellants would have us give the share in question to the issue of Susan's brothers, who are now the surviving heirs at

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law of the testator. But the testator has himself prescribed the condition upon which the brothers or their issue are to take. They are to take "said one-third part of my real estate, as also the share of the income of my real estate directed to be paid to my daughter during the life time of my wife," if the daughter's children die before attaining the age of twenty-one years. The children are dead, but they have attained the prescribed age. The issue of the brothers, therefore, cannot take under the will. To sustain their claim of title, the ownership of the remainders must be held to be unprovided for, and division made as upon intestacy. We ought not to yield to such a conclusion unless driven to it by sheer compulsion.

The testator probably expected his wife to die before his children. At the same time, he did not forget that his expectations might not be realized (*Williams v. Jones*, 166 N. Y. 522). This is seen in the language of the ultimate gift to the brothers or their issue in the event of the death of Susan's children before majority. Brothers or issue then surviving are to take not only the principal, but also the income until the death of the testator's wife. The majority of the grandchildren or their death before majority is consistently maintained as marking the extreme limit of postponement. Then, if not before, the remainders vest in interest.

Our conclusion, therefore, is that Conrad Weber, as the heir at law of the grandchildren, has succeeded to their rights (*Matter of Brown*, 154 N. Y. 313); that he is now the person presumptively entitled to the next eventual estate; and that the income goes to him.

The order should be affirmed with costs to the respondents payable out of the estate.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN and CRANE, JJ., concur.

Order affirmed.

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Statement of case.

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COUNTY OF ERIE, Appellant and Respondent, *v.* SOL L. FRIDENBERG et al., Respondents and Appellants, Impleaded with Others.

Eminent domain — costs — condemnation of land for a public highway — damages for loss of water from well caused by construction of highway — right to grant costs in such proceeding to non-resident owner of land is not taken away by section 154 of Highway Law as amended by chapter 497 of Laws of 1915, but an extra allowance may not be granted.

1. In a proceeding to condemn lands for a public highway, the commissioners found that a well, supplied by subterranean water, was located upon lands of the defendant owner not taker in the proceeding, and immediately adjacent to a parcel so taker, that the same became dry immediately after, and, as a direct result of the blasting done upon the parcels of the land taken, and the cut or excavation made thereon. *Held*, that the owner's damages by reason of the loss of water in his well were incident to the construction of the highway and so directly resultant therefrom that compensation for taking his lands without including therewith the damages to the well as a part of the damages to his remaining land would not be just or an adequate equivalent for his loss.

2. The owner is a non-resident of the state and the court at Special Term refused to allow him any costs in the proceeding on the ground that it had no power. *Held*, that it was not the intention of the legislature by the amendment to section 154 of the Highway Law (Laws of 1915, ch. 497) to take away the power of the court to allow an owner costs in a condemnation proceeding under such law unless the same can be allowed pursuant to the provisions of section 3372 of the Code of Civil Procedure. That section, when made applicable to the Highway Law, should be given the same meaning and effect that it has in the Code, and not be so construed as to prevent an award of costs to an owner in a condemnation proceeding where costs may be essential to secure to him just compensation for his property. The court is not given power, however, to grant an extra allowance of costs.

County of Erie v. Fridenberg, 176 App. Div. 949, modified.

(Argued October 3, 1917; decided October 23, 1917.)

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Points of counsel.

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APPEAL by the plaintiff from so much of an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 16, 1917, which affirmed so much of a final order in a special proceeding for the condemnation of property for the purposes of a public highway as included in the compensation awarded to the defendants Fridenberg an item of \$1,500 for loss of the water supplying a well. Also an appeal by the defendants Fridenberg from so much of said order as refused to grant to them costs in the special proceeding.

The facts, so far as material, are stated in the opinion.

Carleton H. White and Asher B. Emery for plaintiff, appellant and respondent. The resultant injury to the defendants Fridenberg in the loss of their well is, under the facts herein, *damnum absque injuria*. (L. 1909, ch. 30, §§ 150-152, amd. L. 1911, ch. 503; *New River Co. v. Johnson*, 105 Eng. C. L. 434; *Queen v. Met. Board of Works*, 113 Eng. C. L. 710; *Village of Delhi v. Youman*, 45 N. Y. 362; *Hathorn v. Strong's Sanitarium*, 55 Misc. Rep. 445; *Phelps v. Nowlen*, 72 N. Y. 39.)

Frederic Ullman for defendants, respondents and appellants. When the sovereign power of the state takes land it must not alone pay for the land itself but it must award to the owner a sum that will fully indemnify him as to those proximate and consequential damages flowing from this active sovereign power. Wherever the state or any of its subdivisions destroys a spring of percolating waters it must be paid for by such state or political subdivision thereof. (*South Buffalo Ry. Co. v. Kirkover*, 176 N. Y. 301; *Parker v. B. & M. R. R. Co.*, 3 Cush. 114; *Matter of Board of Public Improvement*, 99 App. Div. 576; *Matter of City of Rochester*, 24 App. Div. 383; *Smith v. City of Brooklyn*, 18 App. Div. 340; 160 N. Y. 357; *Forbell v. City of New York*, 164 N. Y. 522;

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Merrick Water Co. v. City of Brooklyn, 29 App. Div. 354; 160 N. Y. 657; *County of Orange v. Ellsworth*, 98 App. Div. 280.) The defendants (Fridenbergs) moved for costs and an extra allowance in the court below which was erroneously refused on the ground that the proceedings herein were taken under the Condemnation Laws of the state and that section 3372 of the Code of Civil Procedure must govern the question of costs and that under that section the defendants (Fridenbergs) were not entitled to costs. (*Matter of State of New York*, 152 App. Div. 637; *O. L. & P. Co. v. Schwarzenbach*, 164 App. Div. 548; *Matter of City of New York*, 125 App. Div. 222; *Matter of B. U. El. R. R. Co.*, 176 N. Y. 216.)

CHASE, J. The defendant Sol. L. Fridenberg is the owner of a farm in the county of Erie. Pursuant to the Highway Law (Article 6) the board of supervisors requested the construction of a county highway in said county which it located so as to pass over said farm. The commissioner approved the highway and a proceeding was commenced in the name of the county to acquire for such highway purposes the property described therein. The court appointed commissioners "to ascertain the compensation to be made to the owners for the property to be taken for the public use specified." The property so taken of Fridenberg included 2.73 acres of land upon which was situated 150 feet in length of a barn or shed 275 feet long, and a hedge of locust trees. The commissioners also found "That a well, supplied by subterranean water, was located upon lands of the defendant owner not taken in this proceeding and immediately adjacent to the above parcel so taken; and that the same became dry immediately after, and, as a direct result of the blasting done upon the parcels of the land taken herein, and the cut or excavation made" thereon.

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The highway department pursuant to the plan for said highway made a cut through a portion of the land taken and near said well, which cut was forty-two feet deep. The commissioners found that the amount to which the owner was entitled as compensation for the property so taken for public use was \$5,286.48, and in their report separately stated the items considered by them in making up the amount of such compensation. Among the items so considered by them was one of \$1,500 for loss of water supplying the well. The only question on this appeal presented by the county of Erie is whether the commissioners had any right or authority to take into account the loss of water in said well in making up the compensation to be paid to Fridenberg for taking the lands as stated, for highway purposes.

Private property cannot be taken for public use without "just compensation." (Constitution of the State of New York, article 1, § 6.) It is provided by our Condemnation Law (Code of Civil Procedure, § 3370) that the commissioners shall "ascertain and determine the compensation which ought justly to be made by the plaintiff to the owners of the property appraised by them; and, in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use for which the property is to be taken, or the construction of any proposed improvement connected with such public use."

It is provided by the Highway Law (Cons. Laws, ch. 25), section 152, that the commissioners shall "Make and sign a report in writing, in which they shall assess, allow and state the amount of damages to be sustained by the owners of the several lots, pieces or parcels of land to be taken for the purposes aforesaid."

The statute provides that the property shall be acquired "for the requisite right of way." (§ 148.) Fridenberg's

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property was taken for a right of way, a public purpose—and without his consent. Such taking can only be sustained on giving the owner "just compensation." Just compensation is reasonable and adequate compensation and the equivalent for the actual loss that the owner sustains by reason of the public taking his private property. The rights of the parties in this case are not controlled by the rule relating to the rights of adjoining owners in the legitimate use of their respective properties. In such case if percolating water is intercepted by such use, an adjoining owner may be without remedy. (*Village of Delhi v. Youmans*, 45 N. Y. 362; *Bloodgood v. Ayers*, 108 N. Y. 400.)

Where land is acquired for public use without the consent of the owner he is entitled to recover the market value of the premises actually taken and also any damages resulting to the residue including those which will be sustained by reason of the use to which the portion taken is to be put by those acquiring it. (*South Buffalo Ry. Co. v. Kirkover*, 176 N. Y. 301.) The owner's damages in this case by reason of the loss of water in his well were incident to the construction of the highway and so directly resultant therefrom that compensation for taking his lands for highway purposes without including therewith the damages to the well as a part of the damages to his remaining land would not be just or an adequate equivalent for his loss. (*Trowbridge v. Brookline*, 144 Mass. 139; *Parker v. Boston & Maine R. R.*, 3 Cushing, 107; *Cleveland, C. & St. L. R. Co. v. Hadley*, 179 Ind. 429; 101 N. E. Rep. 473; 45 L. R. A. [N. S.] 796; Lewis *Eminent Domain* [3d ed.], vol. 2, sections 686, 710; *Ruling Case Law*, vol. 10, pages 153-158.)

The owner is a non-resident of the state and the court at Special Term refused to allow him any costs in the proceeding, holding that it had no power to allow him

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costs, the judge presiding, saying: "If any authority can be found authorizing an allowance of costs to the defendants Fridenberg, the court would unhesitatingly make the allowance in this case."

The question of power depends upon the construction of section 154 of the Highway Law, as amended by chapter 497 of the Laws of 1915, by which there was included therein a clause providing that costs in the proceeding "shall be awarded pursuant to the provisions of section 3372 of the Code of Civil Procedure." Prior to the amendment stated it was held that in cases where an owner of property is not a resident of the state, costs may be awarded under section 3240 of the Code of Civil Procedure which relates generally to costs in special proceedings. (*Matter of State of New York*, 152 App. Div. 633; affd., 207 N. Y. 582; *Oneonta Light & Power Co. v. Schwarzenbach*, 164 App. Div. 548; affd., 219 N. Y. 588.)

"A person or corporation, whose property is sought to be taken under condemnation proceedings, is entitled to be heard at every step in the process, and in justice should be compensated not only for the land or property taken, but should be indemnified against all costs and expenses reasonably incurred either in resisting the appropriation or in the proceedings for ascertaining the compensation to be made." (*Matter of City of Brooklyn*, 148 N. Y. 107, 109.)

It has been held in substance that if in a proceeding to acquire private property for public use the burden is cast upon the owner to pay the expenses which are necessary in the proceeding, the constitutional guaranty of just compensation would not be maintained. (See Lewis *Eminent Domain* [3d ed.], vol. 2, section 812, and cases cited.)

We do not think that it was the intention of the legislature by the amendment to section 154 of the

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Highway Law to take away the power of the court to allow an owner costs in a condemnation proceeding under such law unless the same can be allowed pursuant to the provisions of section 3372 of the Code of Civil Procedure. That section of the Code of Civil Procedure, when made applicable to the Highway Law, should be given the same meaning and effect in the Highway Law that it has in the Code of Civil Procedure, and not be there so construed as to prevent an award of costs to an owner in a condemnation proceeding where costs may be essential to secure to such owner just compensation for his property taken for a public use. Upon the record before us it would seem that the owner should be allowed costs as in an action. The court is not given power to grant an extra allowance of costs in this case. (*Matter of Holden*, 126 N. Y. 589; *Matter of State of New York*, *supra*.)

We understand that the claim of the owner regarding interest on the award is conceded by the county and that there is now no controversy in regard to it.

The order should be modified by remitting the proceeding to the Special Term to determine whether costs be awarded the owner, and if so, to include the same therein, and as so modified said order should be affirmed, with costs to the defendants Fridenberg.

HISCOCK, Ch. J., COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ., concur.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
FREDERICK VAN TINE, Appellant, *v.* LAWSON PURDY
et al., Constituting the BOARD OF TAXES AND ASSESS-
MENTS OF THE CITY OF NEW YORK.

Civil service — appeal — proceeding to reinstate civil service employee in position from which he had been removed without an opportunity of making an explanation — when decision therein presents only question of law and is appealable to this court — removal of a deputy tax commissioner of New York city violation of the city charter.

1. In a proceeding to reinstate a civil service employee in a position from which he had been removed without an opportunity of making an explanation where the material allegations of a petition for a writ are admitted, or not denied, and different inferences cannot be drawn therefrom, only a question of law is presented and the decision is upon the merits and appealable to this court. (*People ex rel. Perrine v. Connolly*, 217 N. Y. 570, followed.)

2. The removal of one from the position (Civil Service Law, § 22) of deputy tax commissioner of the city of New York, to which position he had been regularly appointed from the competitive civil service list, without giving him an opportunity of making an explanation, or entering the grounds of his removal upon the records of the department, is a violation of the city charter (L. 1901, ch. 466, § 1543).

People ex rel. Van Tine v. Purdy, 177 App. Div. 887, reversed.

(Argued October 4, 1917; decided October 23, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 16, 1917, which affirmed an order of Special Term denying a motion for a writ of mandamus to compel the defendants to restore the relator to the office of deputy tax commissioner of the city of New York.

The facts, so far as material, are stated in the opinion.

Charles E. Hughes, Jr., for appellant. The dismissal of the relator without giving him an opportunity of making an explanation was contrary to the provisions

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of section 1543 of the Greater New York charter. (*Matter of Griffin v. Thompson*, 202 N. Y. 104; *People ex rel. Mitchel v. La Grange*, 2 App. Div. 444; 151 N. Y. 664; *People ex rel. Segee v. Hayes*, 106 App. Div. 563; *Craigie v. City of New York*, 114 App. Div. 880; *People ex rel. Ryan v. Wells*, 176 N. Y. 462; 178 N. Y. 135; *People ex rel. Somerville v. Williams*, 217 N. Y. 40.)

Lamar Hardy, Corporation Counsel (*Terence Farley* and *Elliot S. Benedict* of counsel), for respondents. For the reason that it does not appear, in the order of affirmance, that the application was denied as a matter of law, it must be assumed, in the absence of proof to the contrary, that it was denied in the exercise of the discretion vested in the Supreme Court. The order, therefore, is not appealable to this court. (*People ex rel. Jacobus v. Van Wyck*, 157 N. Y. 495; *People ex rel. Steinson v. Board of Education*, 158 N. Y. 125; *Matter of McGuiness v. McAneny*, 211 N. Y. 535; *Matter of Winters v. Prendergast*, 211 N. Y. 536; *People ex rel. Brooklyn Heights R. R. Co. v. Connolly*, 211 N. Y. 537; *Matter of Griffin v. Williams*, 216 N. Y. 651.) This court has squarely held that a deputy tax commissioner was removable at the pleasure of the appointing power. (*People ex rel. Ryan v. Wells*, 178 N. Y. 135.) A deputy is specifically excepted from the prohibition against summary removal, contained in section 22 of the Civil Service Law. (*People ex rel. Ryan v. Wells*, 178 N. Y. 135; *People ex rel. O'Keeffe v. McFadden*, 75 App. Div. 264; *People ex rel. Rossner v. Armbruster*, 59 Hun, 587; *People ex rel. Jones v. Baker*, 12 Misc. Rep. 389; *People ex rel. Williams v. Darling*, 67 Misc. Rep. 205; *People ex rel. Lyons v. Hopper*, N. Y. L. J., June 2, 1914; 164 App. Div. 934.) The so-called "Veteran Acts" do not apply to persons holding public office; they were only designed to protect those who occupy subordinate

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govermental positions. (*People ex rel. Fonda v. Morton*, 148 N. Y. 156; *People ex rel. Jacobus v. Van Wyck*, 157 N. Y. 495; *People ex rel. Baird v. Nixon*, 158 N. Y. 229; *Matter of Christey v. Cochran*, 211 N. Y. 333; *People ex rel. Mc Knight v. Glynn*, 56 Misc. Rep. 35.)

McLAUGHLIN, J. This appeal is from an order of the Appellate Division, first department, which unanimously affirmed an order of the Special Term, denying the relator's application for a peremptory writ of mandamus compelling defendants to reinstate him as deputy tax commissioner of the city of New York. The facts set out in the petition upon which the application was based were undisputed. The petition set forth, in substance, that in September, 1900, the relator having taken and passed a competitive examination according to law and the civil service rules, was regularly appointed from the civil service list to the position of deputy tax commissioner of the city of New York and performed his duties as such until January 1, 1916, when the defendants dismissed him from his position without giving him an opportunity of making an explanation as required by section 1543 of the Greater New York charter (L. 1901, ch. 466). Other matters are set forth which it is unnecessary to consider.

The relator contends, and it is upon this ground alone that he bases his appeal, that the writ should have been granted since his dismissal was in direct violation of the section of the charter referred to. This section, after providing that the heads of all departments shall have the power to appoint and remove all chiefs of bureaus, clerks, officers, employees and subordinates in their respective departments, "except as herein otherwise specially provided" contains the following provision: "But no regular clerk or head of a bureau, or person holding a position in the classified municipal civil service

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subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation; and in every case of a removal, the true grounds thereof shall be forthwith entered upon the records of the department * * * and a copy filed with the municipal civil service. In case of removal, a statement showing the reason therefor shall be filed in the department."

The object sought to be accomplished by the provision quoted is obvious. It is to protect persons appointed to a position in the classified municipal civil service, subject to competitive examination, from summary removal. Before such removal can be made the person removed must be given an opportunity of making an explanation. This is a positive requirement and cannot in any case be disregarded. A trial upon specific charges is not necessary, but an opportunity to explain the cause assigned as the basis for the removal must, in every case, be given. The cause assigned must not be a mere whim or caprice of the one clothed with the power of removal, a mere subterfuge to get rid of the person holding the position; on the contrary, it must be of substance, relating to the character, neglect of duty or fitness of the person removed to properly discharge the duties of his position. (*Matter of Griffin v. Thompson*, 202 N. Y. 104; *People ex rel. Mitchel v. La Grange*, 2 App. Div. 444; affd., on opinion below, 151 N. Y. 664.) The relator in the present case was not given an opportunity to make an explanation before being removed, nor was the ground for his removal entered upon the record of the department and a copy filed with the municipal civil service. His removal, therefore, was unlawful if the position which he held came within the provisions of the charter above quoted.

Before determining that question it may be well to dispose of the suggestion of the corporation counsel to

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the effect that the order of the Appellate Division must be affirmed since it does not appear therefrom that the relator's application was denied as a matter of law, and since that fact does not appear in the order it must be assumed it was denied in the exercise of the discretion vested in the Supreme Court. This contention has for its support the general rule. (*Matter of Winters v. Prendergast*, 211 N. Y. 536; *People ex rel. Brooklyn Heights R. R. Co. v. Connolly*, 211 N. Y. 537.) The rule, however, has its exceptions. (*People ex rel. Perrine v. Connolly*, 217 N. Y. 570.) When the material allegations of a petition for a writ are admitted, or not denied, and different inferences cannot be drawn therefrom, then only a question of law is presented and the decision is upon the merits and appealable to this court. (*People ex rel. Flood v. Association of Master Plumbers of the City of New York*, 214 N. Y. 710; *People ex rel. Perrine v. Connolly*, *supra*.) The present appeal comes within the exception. The facts set out in the petition are not denied and only one inference can be drawn from them. Only a question of law is, therefore, presented. This fact is conceded in the brief of the corporation counsel, in which he says, "All we have here is a bald question of statutory construction." The appeal, therefore, may be considered upon the merits.

It is strenuously urged on the part of the corporation counsel that the writ was properly denied because the relator was not entitled to the protection of the section of the charter above quoted. His contention in this respect is that the relator was not a clerk, head of a bureau, or holding a position in the classified municipal civil service subject to competitive examination. He certainly was not a clerk or head of a bureau, but I think he did hold a position in the classified municipal civil service subject to competitive examination, and for that reason could not be removed until he had been

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afforded an opportunity to make an explanation. He was appointed from the civil service list after a competitive examination and the word "position" does not seem to me to denote, as contended by the respondent, a subordinate place. It is defined in section 22 of the Civil Service Law (Laws of 1909, chap. 15; Cons. Laws, ch. 7) as a "position." The language is: "Nothing in this section shall be construed to apply to the position of private secretary, cashier or deputy of any official or department," and in *People ex rel. Ryan v. Wells* (176 N. Y. 462 and 178 N. Y. 135) this court held that a deputy tax commissioner was a "deputy" within the meaning of that section. The relator, therefore, was entitled, by reason of the position which he held, to the protection of the statute. Not having been given that his removal was illegal.

The order appealed from should, therefore, be reversed, and application of the relator granted, with costs in all courts.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and CRANE, JJ., concur.

Order reversed, etc.

In the Matter of the Claim of JACOB DOSE against
MOEHLER LITHOGRAPHIC COMPANY et al., Respondents.

STATE INDUSTRIAL COMMISSION, Appellant.

Workmen's Compensation Law — meaning and application of term "employee" in section 3 of law as amended by chapter 622 of Laws of 1916 — when bricklayer doing repair work for printing company whose business is hazardous under the law is entitled to compensation for injury received while engaged in repairing its plant.

1. The amendment to the Workmen's Compensation Law by chapter 622 of the Laws of 1916 was intended to and does embrace an additional class of employees, viz., those in the service of an

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employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment.

2. A bricklayer, employed to make repairs to the plant of a company engaged in the business of lithographing and printing, classified as hazardous in group 40 of section 2 of the law, is an "employee" within the terms of the law and is entitled to compensation for injuries resulting from the fall of a scaffold upon which he stood while engaged in the work for which he was employed. The fact that he was employed in bricklaying, which was not carried on for pecuniary gain by the company, does not preclude an award to him since his employment was incidental and requisite to the business carried on by his employer. (*Matter of Bargey v. Masearo Macaroni Co.*, 170 App. Div. 103; affirmed, 218 N. Y. 410, 412, distinguished.)

Matter of Dose v. Moehle Lithographic Co., 179 App. Div. 519, reversed.

(Argued October 4, 1917; decided October 23, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 2, 1917, reversing an award of the state industrial commission made under the Workmen's Compensation Law and dismissing the claim.

The facts, so far as material, are stated in the opinion.

Merton E. Lewis, Attorney-General (*E. C. Aiken* of counsel), for appellant. A manufacturing company which makes an alteration to its building or builds a building for the purpose of manufacturing does it for pecuniary gain. The building is as necessary to its manufacturing needs as the manufacturing itself. One could not be conducted without the other. The employer in this case in having the walls of its plant repaired was doing that for pecuniary gain. (*Larsen v. Paine Drug Co.*, 218 N. Y. 252; *Mulford v. Pettit & Son*, 220 N. Y. 540; *Herbert v. Shanley Co.*, 242 U. S. 591.)

Frederick W. Catlin, Norman G. Hewitt and Robert H. Woody for respondent. Claimant was not in the "employment" of the lithographic company in the sense intended by the Compensation Act so as to entitle

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him to compensation from said company for the injury sustained by him. (*Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410.)

HOGAN, J. The Moehle Lithographic Company, hereinafter designated as the "Company," is engaged in the business of lithographing and printing, classified as hazardous in group 40, section 2, of the Workmen's Compensation Law. The business of the company is carried on in a plant maintained by it in the borough of Brooklyn.

The claimant Dose, by occupation a bricklayer, was employed by the company to point up one of the walls of its plant and repair cracks therein. For such labor he and his helper were to be paid the regular wages for bricklayers and bricklayer's helpers. The company furnished all materials, ladders and supplies. Dose had been employed at the work in question without the aid of a helper for two or three days, and while thus engaged on June 22, 1916, one of the ropes supporting a scaffold upon which he was at work broke. Dose was precipitated a distance of some thirty feet to the ground, receiving injuries for which an award was made to him.

Upon appeal therefrom by the company and insurer the determination of the Industrial Commission was reversed and the claim dismissed upon the authority of *Matter of Bargey v. Massaro Macaroni Co.* (170 App. Div. 103; affirmed, 218 N. Y. 410, 412). I conclude the *Bargey* case is clearly distinguishable from the case at bar.

In that case the accident which resulted in death occurred December 2, 1915. Compensation was awarded April 30, 1915. The reversal by the Appellate Division was made November, 1915. The deceased, a carpenter and builder, had entered into a contract to "raise the second and third story floor and roof of the southwest corner of the macaroni factory to a level with the floor

and roof north of this section," and to furnish the material and labor therefor for a stated sum. During the performance of the contract, work additional to that contracted for developed which Bargey did as directed and presented bills therefor to the macaroni company. The factory proper was upon the second and the third floor. When Bargey met his death he was engaged in work in a room on the first floor, which work was additional to that covered by the contract. The determination of the Industrial Commission was reversed by the Appellate Division upon the ground that Bargey was not an employee engaged in a hazardous employment within the Compensation Law, which conclusion was approved by this court.

Judge COLLIN, writing for the court, said: "Obviously, two factors are essential to empower the commission to award compensation, namely, (a) an employee injured, (b) while engaged in a hazardous employment named in the section." The opinion then quotes definitions from the Compensation Law in force at the time of the death of Bargey, and in substance holds that though the macaroni company was an employer because it employed workmen in a hazardous employment, to wit, preparing macaroni, Bargey was not an employee because he was not engaged in the preparation of macaroni.

At the time the Bargey claim arose and the award was made, the Workmen's Compensation Law (Cons. Laws, ch. 67, section 3) contained the following definitions: "'Employer' * * * a person, partnership, association, corporation, * * * employing workmen in a hazardous employment * * *.' " 'Employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic

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servants:" " ‘Employment’ includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain:" " ‘Injury’ and ‘personal injury’ mean only accidental injuries arising out of and in the course of employment * * *."

By chapter 622, Laws of 1916, the statute defining “employee” was amended to read:

“ ‘Employee’ means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants.”

As bearing upon the purpose of the amendment, the brief of counsel for the Industrial Commission calls attention to the report of the State Industrial Commission to the legislature for the year 1915 wherein the commission recommended an amendment to the law which would “cover employees called in to do construction or repair work as in the *Bargey* case, and also clerical office employees and others who are not definitely and clearly included within the scope of the act at the present time,” and to a memorandum made by the governor approving the amendment.

While the documents referred to indicate the intention of the legislature in the enactment of the amended statute and a construction of the same by the executive, it is obvious from a comparison of the earlier law with the amended statute, that under the statute before the amendment an employee to be entitled to an award must have been engaged in a hazardous employment in the service of an employer conducting a hazardous employment. Such was the construction of the law in the *Bargey* case. The amendment of 1916 was intended to and does embrace an additional class of employees,

viz., those in the service of an employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment. The claimant Dose was clearly within the class embraced in the amended law.

The Appellate Division held that the injury to Dose did not arise out of and in the course of an employment "carried on by the employer for pecuniary gain," that Dose had no connection whatever with the hazardous employment conducted in the building; that his injury arose not out of and in the course of the work of lithographing and printing but of bricklaying and the employment of bricklaying was not carried on by the employer for pecuniary gain. That conclusion would render meaningless the amendment of 1916. The company was an employer of workmen. It conducted a hazardous business for pecuniary gain, which term as used in the statute merely means that the employer must be carrying on a trade, business or occupation for gain in order to come within the act. (*Matter of Mulford*, 220 N. Y. 543.) The injury received by Dose was accidental and sustained by him as an employee in the service of the company which carried on a hazardous employment. The fact that he was employed in bricklaying, which was not carried on for pecuniary gain by the company, is untenable. A proper conduct of the business of the company required a suitable plant, machinery, tools, etc. The company could not in justice to itself, its business or its employees, continue business in a plant which was actually unsafe or in danger of becoming so. Dose was engaged in an employment incidental and requisite to the business carried on by the company and under the law as amended was clearly entitled to compensation.

In *Larsen v. Paine Drug Co.* (218 N. Y. 252, 256), decided prior to the amendment of 1916, this court held, Judge Hiscock writing, "where * * * an employee

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is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed."

The same principle was applied in *Matter of Waters v. Taylor Co.* (218 N. Y. 248) and *Matter of Glatzl v. Stumpp* (220 N. Y. 71).

The language quoted, especially when applied in connection with the amendment to the statute in this case, justified the award made by the State Industrial Commission.

The order of the Appellate Division should be reversed and the determination of the State Industrial Commission affirmed, with costs to the commission in the Appellate Division and this court.

HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZ, McLAUGHLIN and CRANE, JJ., concur.

Order reversed, etc.

WILLIAM E. BARBER, Respondent, *v.* P. HENRY SMEALLIE et al., Copartners under the Firm Name of P. H. SMEALLIE & COMPANY, Appellants.

Master and servant — when master not liable for alleged incompetence of servant.

A recovery cannot be had in an action by an employee against his employer for injuries sustained by reason of incompetence of a fellow-servant because of the inability of the latter to understand the English language, where this fact was not shown to be the proximate cause of the injury and it does not appear that the master was otherwise chargeable with knowledge of his lack of sufficient intelligence.

Barber v. Smealie, 166 App. Div. 948, reversed.

(Argued October 12, 1917: decided October 23, 1917.)

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 27, 1915, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover for personal injuries alleged to have been occasioned plaintiff through the negligence of defendants. Plaintiff was in the employ of the defendants in their paper mill. In the performance of his work he was required to insert his hand into a pump to clean it. While doing this, one of the other employees of defendants moved a clutch which started the machinery, seriously injuring plaintiff's hand and arm.

Andrew J. Nellis and William H. Foster for appellants.

D. L. Snook and Daniel Naylon, Jr., for respondent.

POUND, J. Plaintiff was injured by the act of a fellow-servant. Defendants' liability is based upon the rule which requires the master to use reasonable care to employ competent men. The incompetency complained of and brought home to defendants consisted in the inability of plaintiff's fellow-servants to understand the English language. No other incompetency which made their presence a danger to plaintiff was brought to defendants' notice. Incompetency of a servant may be due to his inability to understand the English language (*Beers v. Isaac Prouty Co.*, 200 Mass. 19), but no rule imposes liability upon an employer merely because he hires men who do not understand English. (*Friberg v. Builders Iron & Steel Co.*, 201 Mass. 461.) The incompetency must be the proximate cause of the injury, the injury the result of the incompetency. Plaintiff's injury was not due to the inability of the person who caused it to understand the English language. It may have been due to lack of sufficient intelligence on the part of such

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person to understand that he should not start the pump while plaintiff was down stairs, but it does not appear that defendants were chargeable with notice that the man was thus mentally deficient.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

HISCOCK, Ch. J., CUDDEBACK, McLAUGHLIN and ANDREWS, JJ., concur; CHASE and HOGAN, JJ., dissent.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWARD VALIANT, Respondent, *v.* JAMES D. PATTON, as Sheriff of Albany County and Custodian of the Albany County Penitentiary, Appellant.

Crimes — statutes relating to suspension of sentence and probation construed — revocation of probation and imposition of sentence within two years from date of probation.

1. The statutes dealing with the subject of probation, revocation of probation and infliction of punishment which has been suspended (Code Crim. Pro. §§ 11-a and 483) must be read and construed together, and when in conflict section 11-a must control.

2. This writ was sued out and the release of the relator demanded on the ground that at the date when the probation was revoked and the sentence imposed, which was more than one year after the date of his conviction, the time within which said latter act could be performed had expired, and that, therefore, the sentence and the imprisonment thereunder were illegal, and this view has been sustained by the Appellate Division. *Held*, that this conclusion is erroneous.

3. The fact that the trial court in placing defendant on probation omitted to fix the period for which such probation should continue does not render invalid the sentence, since, in the absence of other limitation, it would be assumed that the probationary period should not continue for more than two years, the period fixed by the statute. Moreover, the omission would not render the judgment void, but the sentence would be subject to correction in this respect.

People ex rel. Valiant v. Patton, 173 App. Div. 990, reversed.

(Argued October 5, 1917; decided October 30, 1917.)

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Opinion, per HISCOCK, Ch. J.

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APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 18, 1916, which directed the discharge of the relator upon habeas corpus.

The facts, so far as material, are stated in the opinion.

Harold D. Alexander for appellant. The relator was on probation in December, 1915. (Code Crim. Pro. § 11-a, ¶ 4.) The relator's claim that the court did not fix the period of probation herein, and, therefore, that the judgment as to probation is void cannot be sustained. (*Weed v. People*, 31 N. Y. 464; *People v. Trezza*, 128 N. Y. 529; *People v. Parr*, 4 N. Y. Cr. Rep. 545; 15 Ruling Case Law, 592; 23 Cyc. of Law & Pr. 670, 1101, 1104, § 2; *Mooney v. Mooney*, 10 Misc. Rep. 386; Freeman on Judgments [4th ed.], 53, 57; Black on Judgments [2d ed.], 162, 163; *People v. Maschke*, 2 N. Y. Cr. Rep. 168; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8.) The petitioner's contention that the case at bar is controlled by subdivision 4 of section 483 of the Code of Criminal Procedure cannot be upheld since a subsequent act covers exactly the same subject, and makes an entirely different provision as to that matter. (Code Crim. Pro. § 11-a.) If the provisions of two statutes are inconsistent, and tend to nullify each other, the later must prevail, as the latest exhibition of the will of the law-making power. (*Matter of Wash. R. R. Co.*, 115 N. Y. 442, 449; *Lyddy v. L. I. City*, 104 N. Y. 218; Sutherland on Stat. Const. [1904] 461, 462, 483, 490, 491.)

John H. Dugan for respondent. The County Court had no power to pronounce judgment upon the relator after one year had elapsed since judgment was suspended. (Code Crim. Pro. §§ 470a, 483, subd. 4.)

HISCOCK, Ch. J. May 11th, 1914, the relator was convicted of a misdemeanor and judgment was rendered

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as follows: " Sentence is suspended and the defendant is placed on probation," etc. In September, 1915, an order was made modifying the conditions of the probation. December 15th, 1915, the probation and suspension of sentence were revoked and relator was sentenced to the Albany Penitentiary for one year and to pay a fine. The present writ was sued out and the release of the relator demanded on the ground that at the date when the probation was revoked and the sentence imposed, the time within which said latter act could be performed had expired, and that, therefore, the sentence and the imprisonment thereunder were illegal, and this view has been sustained by the Appellate Division. We think this conclusion is erroneous.

There are two sections of the Code of Criminal Procedure dealing with the subject of probation, revocation of probation and infliction of punishment which has been suspended — sections 11-a and 483. It is upon the latter section that the relator bases his claim. Subdivision 4 of that section provides that at any time during the probationary term of a person convicted and released on probation, the court before which, or the justice before whom, the person was convicted, " may in its or his discretion, revoke and terminate such probation. Upon such revocation and termination, the court may, if the sentence has been suspended, pronounce judgment at any time thereafter within the longest period for which the defendant might have been sentenced." The relator could only have been sentenced for a term of one year and inasmuch as this period had expired when the probation was revoked and sentence finally imposed, it is said that the power of the court to pronounce sentence had been lost by lapse of time. While it has been assumed that the period of one year within which sentence might be imposed upon revocation of probation commenced running from the date when

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the relator was convicted and originally might have been sentenced, we think that a good deal might be said in favor of another interpretation of the language used in this subdivision. When it provides that upon such revocation and termination, the court may, if the sentence has been suspended, pronounce judgment "at any time thereafter within the longest period for which the defendant might have been sentenced," it is quite natural to construe the language as meaning that the period within which the sentence may thus be pronounced is to commence with and run from the date when the probation is revoked rather than from the date when the defendant was convicted.

If, however, the provision has the meaning which has thus far been given to it, we think it is clearly in conflict with subdivision 4 of section 11-a. That subdivision provides that the period of probation shall not exceed, in the case of a person like the relator, two years, and that "The court or a magistrate thereof * * * may in case of violation of the probationary conditions issue a warrant for the arrest of the probationer; * * * and in case of violation of the probationary conditions, the court may impose any penalties which it might have imposed before placing the defendant on probation." This provision, it will thus be seen, clearly authorizes the court or magistrate on revocation of probation to impose the penalty, in this case imprisonment, which might have been imposed before placing the convicted person on probation and there is no limit of time upon the power to do this such as is found in section 483. There being this conflict, if section 483 has the meaning which has been contended for by relator, the question arises which provision shall prevail. Our judgment is that section 11-a must be controlling. Certain amendments to section 483 were made by chapter 346, Laws of 1910, and subdivision 4 of section 11-a, from which we

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have quoted, was added to that section by chapter 610 of the same year. While both of these amendatory acts took effect on September 1st following, the act amending section 11-a was the later declaration of the legislature. In addition, that amendatory section enacts general and comprehensive rules upon this subject of probation and is entitled "Method of procedure." It outlines a general scheme covering the subject under review before which the provision in the earlier statute must if necessary give way, and we do not overlook the consideration that the procedure outlined by section 11-a upon this point is much more rational and effective than that urged by relator under his construction of section 483. If the relator be right that on revocation of probation which might last two years, the power to inflict a sentence which has been suspended would be lost after the expiration of a year from the time when the person had been convicted, in case of a misdemeanor, we might have the very anomalous result claimed in this case that a person who had been placed on probation, by violating the terms thereof, could secure a release from its conditions, and the court would be unable to substitute any punishment in the place thereof. By his violation of the probation system, the convicted person would secure release and relief from any punishment or restraint whatever and in that way profit by his own wrongdoing. On the other hand, under the provisions of section 11-a, the court would have the power to inflict a proper and deserved punishment on revocation of probation which the convicted person had violated whenever that situation arose.

It is suggested that the court failed to make a valid judgment placing relator on probation because it omitted to fix the period for which such probation should continue. We do not think, however, that this is so. The sentence and judgment were concededly valid in every respect except the one that no period of probation was specified.

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The statute, however, provided that such probationary period should not continue for more than two years, and we think it might well be held that in the absence of other limitation, it would be assumed that the probation was to continue for the time fixed by the statute. Even if this is not so, however, we do not think the omission would render the judgment void, but that the sentence would be subject to correction in this respect. In this particular case the relator continued on probation without question, and it seems to have been understood and assumed that in the absence of other directions the statutory limit of two years controlled.

In accordance with these views, the order of the Appellate Division should be reversed, the writ dismissed and the relator remanded to custody.

CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ., concur.

Order reversed, etc.

In the Matter of the Application of FRANK S. SENIOR et al., Appellants, against EDWARD F. BOYLE et al., Constituting the Board of Elections of the City of New York, Respondents.

Constitutional law — coroner — New York (city of) — statute abolishing office of coroner in Greater New York not in conflict with State Constitution.

The statute (L. 1915, ch. 284) abolishing the office of coroner in Greater New York, and establishing therein the office of chief medical examiner to be appointed by the mayor, is not in conflict with the home rule provision of the State Constitution (Art. 10, § 2).

Matter of Senior v. Boyle, 179 App. Div. 746, affirmed.

(Argued October 30, 1917; decided October 31, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department

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entered October 26, 1917, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the board of elections of the city of New York to print upon the official ballots the names of petitioners as candidates for the office of coroner for the borough of Brooklyn, to be voted for at the general election of 1917.

The facts, so far as material, are stated in the opinion.

Edgar F. Hazleton and *Joseph B. Clark* for appellants. The office of coroner prior to the Constitution of 1894, which took effect on January 1, 1895, was a constitutional office. (*People v. Blair*, 47 N. Y. Supp. 495.) Although the office of coroner was no longer a constitutional one after the enactment of the Constitution of 1894, still it falls within section 2 of article 10 of the Constitution, which is known as the home rule section. (*People v. Blair*, 47 N. Y. Supp. 495; *People v. Scholer*, 87 N. Y. Supp. 1122; *People v. Albertson*, 55 N. Y. 50; *People v. Pelham*, 215 N. Y. 374.) Chapter 284 of the Laws of 1915, which abolished the office of coroner in the city of New York and established in its place the office of chief medical examiner of the city of New York, is unconstitutional and void in that it is in conflict with the provisions of section 2 of article 10 of the Constitution. (*People v. Tax Comrs.*, 174 N. Y. 434; *People v. Pinckney*, 32 N. Y. 377; *Morgan v. Furey*, 188 N. Y. 202; *People v. Raymond*, 37 N. Y. 428.)

Lamar Hardy, *Corporation Counsel* (*George A. Green* and *Thomas F. Magner* of counsel), for respondents. The certificate was properly rejected by the board of elections. The office of coroner ceased to be a constitutional office at the time of the adoption of the present Constitution and became a city office. (*People ex rel. Burger v. Blair*, 21 App. Div. 213; 154 N. Y. 734; *Schultze v. City of N. Y.*, 152 App. Div. 39; 211 N. Y. 552; *People*

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ex rel. Hillmann v. Scholer, 94 App. Div. 282; 179 N. Y. 602.)

POUND, J. "The coroner's is also a very ancient office at the common law" (1 Blackstone, 346), dating from an ordinance of the year 1194 or before then. (1 Pollock & Maitland [2d ed.], 534.) The principal duty of the coroner is to hold an inquisition, with the assistance of a jury, over the body of any person who may have come to a violent death in his county. The office and power of a coroner are "principally judicial." (1 Blackstone, 348; *People v. Jackson*, 191 N. Y. 293.) Notwithstanding the ancient and dignified nature of the office, modern ideas of efficient administration of criminal justice have suggested that it be done away with. Coroners were abolished in Massachusetts in 1877 and "able and discreet men learned in the science of medicine" are appointed to be medical examiners to make autopsies and report cases of violent death to a justice of the district. (Revised Laws of Mass. ch. 24.) In New York the office of coroner ceased to be a constitutional office in 1894. By chapter 378, Laws of 1897, the charter of Greater New York, the office of county coroner in the new city was abolished (*People ex rel. Burger v. Blair*, 21 App. Div. 213; affd., 154 N. Y. 734), and the powers of the county coroners were vested in borough officers who were held to be city officers. (*Schultze v. City of New York*, 152 App. Div. 39; affd., 211 N. Y. 552.)

By chapter 284, Laws of 1915, the office of coroner in Greater New York was abolished, to take effect January 1, 1918, and the office of chief medical examiner of the city of New York was established to be filled by appointment by the mayor. The duty of such chief medical examiner and his assistants is to investigate the circumstances of all violent and suspicious deaths and to file

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a written report thereof in his office and to make autopsies if necessary. Appellants contend that the act is unconstitutional and void, as being in conflict with the home rule provision of section 2 of article 10 of the Constitution of the state of New York. Even if the duties of coroner devolved in their entirety upon the chief medical examiner, the legislature had full power to provide that the duties of such office should be exercised by an officer to be appointed by the mayor rather than by several officers to be elected by the boroughs. (*People ex rel. Metr. St. Ry. Co. v. State Board of Tax Commissioners*, 174 N. Y. 417, 434, 435.) City officers may be appointed "by such authorities thereof, as the Legislature shall designate for that purpose." Section 2 of article 10 of the Constitution recognizes counties, cities, towns and villages, but gives no right of local self government to boroughs as such. But the characteristic features of the office and power of a coroner (Code of Crim. Pro. §§ 773-790) are not retained. The chief medical examiner acts without a jury, holds no inquest, renders no decision, holds no one to answer, issues no warrant of arrest. The ancient office is gone and the ancient duties have largely disappeared with it. Another method of investigating suspicious deaths has supplanted crowner's quest. No valid objection on constitutional grounds appears to the change.

The order appealed from should be affirmed, with costs.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN,
McLAUGHLIN and ANDREWS, JJ., concur.

Order affirmed.

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MARY J. BUCKLES, as Administratrix of the Estate of WILLIAM BUCKLES, Deceased, Respondent, *v.* THE STATE OF NEW YORK, Appellant.

Court of Claims — jurisdiction — notice of intention to file claim must be given pursuant to statute (Code Civ. Pro. § 264).

The Court of Claims has no jurisdiction to hear and determine a claim against the state, where no notice in writing of intention to file a claim has been filed, as required by section 264 of the Code of Civil Procedure. The question being one of jurisdiction, it can be raised at any time and cannot be waived by any officer or authority representing the state.

Buckles v. State of New York, 175 App. Div. 677, reversed.

(Argued October 9, 1917; decided November 13, 1917.)

APPEAL from a judgment, entered March 28, 1917, upon an order of the Appellate Division of the Supreme Court in the third judicial department which reversed a judgment of the Court of Claims dismissing the claim of the plaintiff and directed judgment in her favor for the full amount thereof.

The nature of the claim and the facts, so far as material, are stated in the opinion.

Merton E. Lewis, Attorney-General (Edmund H. Lewis of counsel), for appellant. Having failed to prove the filing of a notice of intention to file a claim against the state pursuant to statute, the claimant's right to relief herein is defeated. (*People v. Dennison*, 84 N. Y. 272; *Lewis v. State of New York*, 96 N. Y. 71; *Rexford v. State of New York*, 105 N. Y. 229; *Peck v. State of New York*, 137 N. Y. 372; *Gates v. State of New York*, 128 N. Y. 221; *Curry v. City of Buffalo*, 135 N. Y. 366; *Reining v. City of Buffalo*, 102 N. Y. 308; *MacMullen v. City of Middletown*, 187 N. Y. 37; *Winter v. City of Niagara Falls*, 190 N. Y. 198; *Carson v. Village of Dresden*, 202 N. Y.

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414; *Murphy v. Village of Fort Edward*, 213 N. Y. 397.) The record clearly shows the objection to the jurisdiction of the Court of Claims was properly taken upon the trial. (*Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526; *Matter of Walker*, 136 N. Y. 20; *Robinson v. Oceanic Steam Nav. Co., Ltd.*, 112 N. Y. 315; *Craig v. Town of Andes*, 93 N. Y. 405; *Kamp v. Kamp*, 59 N. Y. 212; *Callahan v. Mayor*, 66 N. Y. 656; *People ex rel. Buckbee v. Biggs*, 171 App. Div. 373.)

O. A. Dennis for respondent. The state, by failing to object to the trial of the claim promptly, conceding that but one question was in the case and permitting claimant to submit her evidence upon the merits, waived the right to object to the failure to file notice of intention. (*Quayle v. State*, 192 N. Y. 51; *Williams v. State*, 94 N. Y. 490; *Spencer v. State*, 187 N. Y. 484; *Cowenhoven v. Ball*, 118 N. Y. 231; *Peabody v. Long Acre Square Building Co.*, 112 App. Div. 119; *McCarthy v. Village of Far Rockaway*, 3 App. Div. 379; *People v. Journal Co.*, 213 N. Y. 7; *Minton v. City of Syracuse*, 172 App. Div. 45; *People v. Hagadorn*, 104 N. Y. 517; *Matter of Cooper*, 93 N. Y. 512.) A waiver of the alleged condition precedent was pleaded and proven beyond dispute. (*Murphy v. Village of Fort Edward*, 213 N. Y. 402; *Sheehy v. City of New York*, 160 N. Y. 139; *Winter v. City of Niagara Falls*, 190 N. Y. 198; *Forsythe v. Oswego*, 191 N. Y. 441; *Weeks v. O'Brien*, 141 N. Y. 202.)

McLAUGHLIN, J. This appeal involves the question whether the Court of Claims has jurisdiction to hear and determine a claim against the state, where no notice in writing of intention to file a claim has been filed, as required by section 264 of the Code of Civil Procedure.

In 1912 the respondent's intestate, William Buckles, had a contract with the state for resurfacing a portion of a highway in the county of Washington. After he

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commenced work under his contract it was discovered that, owing to the condition of the highway, work and materials not covered by it were required to put it in a proper condition. Buckles was thereupon directed by the superintendent of repairs to perform the additional work and furnish the additional materials, or in default of that to abandon his contract. It was expressly provided in the contract that additional work or materials, if required, should be covered by a supplemental contract in writing, and when Buckles was directed to perform such additional labor and furnish such additional materials, he requested that a supplemental contract for that purpose be first executed. This the authorities representing the state refused to do, telling him that a written contract would not be executed until the work had been completed. Buckles then continued under his contract, performed the additional labor and furnished the additional materials. The whole work was completed about the first of November, 1912. He was then tendered a supplemental contract, dated November 11, 1912, which he executed and which was approved in writing by the superintendent of repairs, but a few days later Buckles died, and for that reason it is fair to assume the contract was never executed on the part of the state.

The work was inspected by the proper officers representing the state and a certificate given that the contract, including the additional work and materials, had been fully performed, and he was entitled to receive from the state the contract prices. Since then it has not been questioned but that the value of the additional labor and materials with a small balance unpaid under the original contract, amounting in all to \$2,682.83, was due Buckles and is now due his estate, and this is the amount for which the claim, with interest, was filed. For one reason or another, payment of this sum was delayed from time to time until a new highway commis-

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sioner went into office and on the 10th of February, 1914, he advised the respondent's attorney he would not sign the supplemental agreement since he personally knew nothing about the matter and that the claim would have to be presented to the Court of Claims. Thereupon, on March 30, 1914, the claim in question was filed with the then Board of Claims, now the Court of Claims (Laws of 1915, chap. 1) and with the attorney-general. Neither before nor after such filing, however, was there filed any notice of intention to file a claim and the Court of Claims accordingly dismissed the claim on that ground, though the deputy attorney-general, representing the state, conceded at the beginning of the trial that the only question involved was whether there could be a recovery in the absence of a supplemental agreement in writing, and he did not raise the question of failure to file the notice until after the claimant had rested. The Appellate Division reversed the determination, one of the justices dissenting, directed judgment for the claimant for the full amount, and the state appeals to this court.

Upon the record there can be no doubt as to the moral obligation of the state to pay the claim, but notwithstanding that fact, I have, with much reluctance, reached the conclusion that the judgment must be reversed and the claim dismissed.

At the time the claim was filed, section 264 of the Code of Civil Procedure provided in part as follows: "No claim other than for the appropriation of land shall be maintained against the state unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the Board of Claims and with the attorney-general a written notice of intention to file a claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be

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signed and verified by the claimant before an officer authorized to administer oaths." It is urged that this provision is similar to the familiar requirement of municipal charters to the effect that no action can be maintained against the municipality unless a notice of intention to sue has been filed within a specified time with the proper officers, and that it is thus, at most, a condition precedent, which can be and has been waived by the state in the present case. Standing alone it might possibly be susceptible of that construction, but the rest of section 264 and its history demonstrates conclusively, as it seems to me, that such construction cannot be maintained.

The requirement as to filing a notice first appeared in section 264 in 1905. (Laws of 1905, chap. 370.) In 1907 this court held that the Court of Claims had no jurisdiction to hear and determine a claim upon a contract which was subject to audit by the comptroller. (*Quayle v. State of N. Y.*, 192 N. Y. 47.) And shortly after that decision, section 264 was amended so as to expressly authorize the determination of claims rejected in whole or in part by the auditing officer. (Laws of 1908, chap. 519.) Claims arising upon or out of a contract with the state had previously been mentioned in the amendment passed in 1906 (Chap. 692) and in order to allow past claims of that kind to be determined by the court the 1908 amendment provided that as to claims which had accrued or which had been filed and dismissed for lack of jurisdiction within three years immediately preceding the passage of the act "The court shall have jurisdiction, if a notice of intention to file such claim is filed in the office of the clerk of the Court of Claims and with the attorney-general within six months and such claim is filed within one year after this section, as amended, takes effect."

It seems perfectly clear from this language that as

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to claims which had then accrued the filing of the notice of intention was a jurisdictional requirement and there is no possible reason suggested why the legislature should have required the filing of a notice of intention to file a claim which had been previously filed and dismissed unless it intended to make filing of such a notice in all cases a jurisdictional requirement. That this was the intention is further apparent from the amendment to the section which was passed in 1912 (Chap. 545). That amendment relates to the Board of Claims substituted in 1911 (Chap. 856) for the Court of Claims and provides in part that "The board shall have jurisdiction, and may hear and determine all claims accrued and actually filed at any time prior to the time that this section, as amended, takes effect, and filed within two years from the time they accrued, though no notice of intention to file was given, as required by this section, if such claims when filed were not barred by lapse of time and the court or board had jurisdiction and authority to hear and determine the same except for the lack of such notice; and such jurisdiction shall attach without refiling or previous notice." This provision has been retained in substance in the later amendments to section 264 and the language used is entirely inconsistent with respondent's contention that the filing of the notice of intention merely relates to procedure.

The state being sovereign is immune from action by a private suitor except with its consent. (*Quayle v. State of N. Y., supra*; *Gates v. State of N. Y.*, 128 N. Y. 221, 228.) It is not like a municipal corporation against which an action can be maintained and over which the courts have jurisdiction irrespective of the conditions precedent which may be hedged around the commencement and maintenance of an action. On the contrary, no claim can be litigated at all against the state, except by its permission. A valid cause of action may exist but

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the state's immunity prevents its enforcement. (*Quayle v. State of N. Y., supra.*) When, therefore, the legislature in granting permission to prosecute an action against the state required notice of intention to be filed, that condition must be complied with in order to subject the state to an action. As was said in *Gates v. State of N. Y., (supra)*: "The state cannot be sued without its consent and it has the right, in authorizing the maintenance of proceedings for the recovery of claims against it, to impose such terms and conditions and to prescribe such procedure as its legislative body shall deem proper. The conditions imposed become jurisdictional facts and determine the status and right of the litigant." Being thus a question of jurisdiction it could be raised at any time and could not be waived by any officer or authority representing the state. (26 Am. & Eng. Ency. of Law [2d ed.], 486, 487; *Callahan v. Mayor, etc., of N. Y.*, 66 N. Y. 656; *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315.)

The state has had the benefit of the labor performed and materials furnished of the value claimed and for which it has never paid a cent. Justice would seem to require that the claim should be paid, and that the legislature, in the exercise of its powers, ought to provide a way for that purpose, but the present judgment cannot be allowed to stand without ignoring the conditions which the legislature has seen fit to impose in permitting actions to be maintained against the state.

The judgment appealed from, therefore, should be reversed and the determination of the Court of Claims affirmed, with costs in this court and the Appellate Division.

HISCOCK, Ch. J., CHASE, CUDDEBACK, POUND and ANDREWS, JJ., concur; HOGAN, J., concurs in result.

Judgment reversed, etc.

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VIOLET M. TURNER, Appellant and Respondent, *v.* HERBERT G. WOOLWORTH, Respondent and Appellant, Impleaded with Another.

Husband and wife — action to recover from husband value of services of attorney for wife in actions for divorce and separation in excess of costs allowed and for moneys advanced by attorney for support of wife while alimony was unpaid — attorney not entitled to lien for services, but has a lien for money loaned to the wife upon the unpaid alimony and fine in contempt proceedings.

1. The action is for legal services rendered and moneys loaned by plaintiff's assignor to a wife in matrimonial controversies with her husband. The money was loaned to maintain her when the husband left her destitute. Thereafter, husband and wife secretly came together and settled their differences. The wife received a sum of money in discharge of the husband's liability under an order which had been made fining him for contempt, and a further sum for costs and alimony under the final judgment. All this is found to have been done collusively and in fraud of the attorney's rights. The plaintiff has been paid all the counsel fees awarded him by order of the court, but the value of the services is found to be greatly in excess of the award. Both husband and wife are defendants. The plaintiff and the husband appeal. *Held*, that the excess cannot be recovered from the husband; that the award made became, with the costs of the action, the measure of the rights of the wife and of her husband's obligation.

2. The motion to punish the husband for contempt was not in a special proceeding but was made in the action. It was, therefore, covered by the orders and no extra compensation can be allowed against him.

3. The fine in the contempt proceedings was a substitute for unpaid alimony and as such is not subject to a lien for counsel fees. Equity confines this fund to the purposes of its creation and declines to charge it with liens which would absorb and consume it.

4. The plaintiff has a lien for money loaned, under an agreement that it should be secured by a lien, for the support of the destitute wife. To the extent of his advances to the wife, he was subrogated to the remedy against the husband.

Turner v. Woolworth, 165 App. Div. 70, modified.

(Argued October 15, 1917; decided November 13, 1917.)

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Points of counsel.

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CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 10, 1915, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alexander S. Bacon for plaintiff, appellant and respondent. From no standpoint whatever is it just that the attorney or counsel should be limited by the amount of counsel fee given pending trial. (*Horn v. Schmalholz*, 150 App. Div. 333; *Kellogg v. Stoddard*, 89 App. Div. 137.) Even though, in ordinary circumstances, the attorney could not recover full value for his services, the fraudulent character of the settlement would afford a remedy. (*Andrews v. Haas*, 214 N. Y. 259; *Glenn v. Hill*, 50 Ga. 94.)

Arnold L. Davis for defendant, respondent and appellant. No cause of action against the defendant Herbert G. Woolworth was proven and the complaint should have been dismissed on his motion at the conclusion of the trial. (*Arlington Co. v. Norwich F. I. Co.*, 107 Fed. Rep. 662; *Arlington Co. v. Colonial Assur. Co.*, 180 N. Y. 337; *Arlington Co. v. Empire City F. I. Co.*, 116 App. Div. 458; *Lyon v. West Side Transfer Co.*, 132 App. Div. 777; *Turner v. Woolworth*, 153 App. Div. 293; *Romaine v. Chauncey*, 129 N. Y. 566; *Matter of Williams*, 208 N. Y. 32; *Matter of Brackett*, 114 App. Div. 257; *Matter of Bolles*, 78 App. Div. 180; *Branth v. Branth*, 10 N. Y. Supp. 638.) The court erred in adding costs to counsel fee in arriving at the value of the attorney's services for which this appellant was liable. (*Turner v. Woolworth*, 153 App. Div. 293; *Naumer v. Gray*, 28 App. Div. 529; *Daman v. Bancroft*, 88 N. Y. Supp. 386; *Romaine v. Chauncey*, 129 N. Y. 566; *Matter of*

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Williams, 208 N. Y. 32; *Matter of Brackett*, 114 App. Div. 257; *West v. Washburn*, 153 App. Div. 460; *McIlvaine v. Steinson*, 90 App. Div. 77; *Earley v. Whitney*, 106 App. Div. 399; *Caccia v. Isecke*, 123 App. Div. 779; *Starin v. Mayor, etc., of N. Y.*, 106 N. Y. 82.)

CARDOZO, J. The plaintiff is the assignee of Mr. Bacon, a member of the bar. The action is for services rendered and money loaned. The services were rendered to a wife in matrimonial controversies with her husband. The money was loaned to maintain her when the husband left her destitute. Both husband and wife are defendants. The wife does not question the decision. The plaintiff and the husband appeal.

In 1903, the defendant Herbert G. Woolworth sued his wife for divorce. She appeared and defended by Mr. Bacon. Counsel fees amounting to \$400, and costs amounting to \$274.45, were awarded to her by the court, and received by her counsel. The trial resulted on April 7, 1904, in a judgment in her favor. The husband then abandoned her.

In May, 1904, the wife sued the husband for separation on the ground of desertion. She appeared again by Mr. Bacon. The court awarded temporary alimony at the rate of \$10 a week, and a counsel fee of \$150. A trial followed, and again the wife prevailed. The judgment is dated January 17, 1906. It awards \$2,580 for back alimony, \$207.02 for costs, and alimony thereafter at the rate of \$30 a week.

In May, 1906, a motion was made to punish the husband for contempt in failing to pay the alimony awarded *pendente lite*. At this time judgment in favor of the wife had already been entered. On July 30, 1906, a fine of \$850, afterwards reduced to \$680, was imposed. While that motion was pending, an additional counsel fee of \$250 was awarded.

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During all this period, the wife was destitute. The husband had defied the orders of the court, and fled its jurisdiction. Mr. Bacon, moved by her needs, advanced to her from time to time \$813.50. He did this upon her promise that he should have a lien for reimbursement upon costs and alimony when collected. She promised at the same time to pay him \$10,000 for his services in the action for separation, with a like lien for his protection.

In April, 1907, husband and wife secretly came together, and settled their differences. The wife received \$700 in discharge of the husband's liability under the order fining him for contempt, and \$1,800 for costs and alimony under the final judgment. All this is found to have been done collusively and in fraud of Mr. Bacon's rights.

The chief question before us has to do with the husband's liability for counsel fees. He has paid all the fees awarded by order in the divorce suit. He has been adjudged liable for the unpaid fees awarded by order in the suit for separation, and also for the costs. The plaintiff says that this is not enough. There is a finding that the true value of the services is greatly in excess of the award. The question is whether the excess may be recovered from the husband.

On motion of the wife in the divorce suit and again in the suit for separation, the court fixed the fees which the husband was to pay. She chose her tribunal and her remedy. The award then made became, with the costs of the action, the measure of her rights and of her husband's obligation. There was ample power to increase the award, if thereafter it appeared to be inadequate. That power, indeed, was exercised, and there were new orders from time to time. But until increased, the award was final. Counsel were no longer at liberty, disregarding the limit of the orders, to hold the husband to his common-law liability for necessities furnished. We do not say that such relief would be denied if the

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wife had made no motion and obtained no order (*Naumer v. Gray*, 28 App. Div. 529, 534; *Horn v. Schmalholz*, 150 App. Div. 333). That question is not before us. She invoked a summary remedy, and must abide by the result. The power to award counsel fees is regulated by the same section of the Code which authorizes the award of alimony (Code Civ. Pro. § 1769). The rule is that alimony, when allotted, measures the husband's duty of support (*Crittenden v. Schermerhorn*, 39 Mich. 661, and cases there cited; *Hare v. Gibson*, 32 Ohio St. 33; *People ex rel. Comrs. of Charities v. Cullen*, 153 N. Y. 629, 637). The liability for counsel fees can be no broader (*Naumer v. Gray, supra*). Any other conclusion might lead in practice to gross abuses. There would be little end to litigation if such orders settled nothing.

The courts below have drawn a distinction between counsel fees in the two actions and counsel fees on the application to punish the husband for contempt. For the latter service, extra compensation of \$468.40 has been awarded. We agree with the defendant's counsel that the distinction is untenable. The application to punish for contempt was not a special proceeding. It was a motion in the action (*Pitt v. Davison*, 37 N. Y. 235; *Jewelers' Merc. Agency v. Rothschild*, 155 N. Y. 255). It was, therefore, covered by the orders. Such motions are common incidents of matrimonial lawsuits. If extra labor follows, the remedy is to move for an increase of the allowance. In point of fact, the court did increase the allowance while the motion to punish for contempt was pending. There is no other liability.

The argument is made that by force of the agreement with the wife, the value of the services may be declared a lien upon the fine. But the fine was not subject to a lien. It was a substitute for the unpaid alimony (Judiciary Law, § 773; Consol. Laws, chap. 35; Code Civ. Pro. § 1773). The purpose of alimony is support.

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Equity, which creates the fund, will not suffer its purpose to be nullified. There were no exceptional circumstances here which made necessary an assignment of future alimony if the suits were to proceed. There was no occasion for such a pledge in order to procure for the wife the services of counsel. She had at all times an adequate remedy by application to the court. In such circumstances, equity, confining the fund to the purposes of its creation, declines to charge it with liens which would absorb and consume it (*Romaine v. Chauncey*, 129 N. Y. 566, 572; *Matter of Brackett*, 114 App. Div. 257; *Jordan v. Westerman*, 62 Mich. 170; *Matter of Williams*, 208 N. Y. 32).

The plaintiff's lien for money loaned stands, however, upon a different basis. This lien was allowed, and, we think, rightly. There was here no diversion of alimony from the purpose of its creation. The husband would not pay, and the wife was destitute. Her lawyer came to her rescue, and, upon her promise of a lien, supplied money for her support. Instead of destroying the fund, he created it. To the extent of his advances, he was subrogated to the remedy against the husband (*Romaine v. Chauncey*, *supra*; *De Brauwere v. De Brauwere*, 203 N. Y. 460; 144 App. Div. 521; 69 Misc. Rep. 472).

Other items of less importance are in controversy. It is enough to say of them that they were properly disposed of in the court below.

The judgment should be modified by deducting \$468.40 from the plaintiff's judgment against the husband Herbert G. Woolworth, and, as modified, affirmed without costs to either party.

HISCOCK, Ch. J., COLLIN, POUND and ANDREWS, JJ., concur; CUDDEBACK, J., dissents from modification; CRANE, J., takes no part.

Judgment accordingly.

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Statement of case.

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**ATTILIO DE CICCO, Respondent, v. JOSEPH SCHWEIZER,
Appellant, Impleaded with Another.**

Marriage settlements — consideration — agreement between father and prospective husband of his daughter to pay daughter certain sum annually — when daughter, although not a party to the contract, may enforce contract and recover unpaid installment.

Articles of agreement were entered into by defendant and his wife with a person who was affianced to and was to be married to their daughter. In consideration of that fact, the father promised the husband to pay a certain sum annually to the daughter. This action is brought by the assignee of the daughter and the husband to recover an unpaid installment. *Held*, that there was a sufficient consideration for the promise; that although the promise was to the husband it was intended for the benefit of the daughter, and when it came to her knowledge she had a right to adopt and enforce it, and in doing so she made herself a party to the contract.

De Cicco v. Schweizer, 166 App. Div. 919, affirmed.

(Argued October 15, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 2, 1915, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Willard Bartlett, Frank G. Wild and Elbridge G. Duvall for appellant. There is no presumption of a consideration for the contract sued upon arising from the character of the instrument. (*Bender v. Been*, 78 Iowa, 283.) The fulfillment of an engagement to marry, subsisting at the time the instrument was executed, could not be a sufficient consideration for the promise of a third party to pay money. (Pollock on Cont. 161; *Vanderbilt v.*

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Schreyer, 91 N. Y. 392; *Robinson v. Jewett*, 116 N. Y. 40; *Kramer v. Kramer*, 181 N. Y. 477; 2 Parsons on Cont. 437; Leake on Cont. [6th ed.] 444; *Cobb v. Cowdery*, 40 Vt. 25; *Conover v. Stillwell*, 34 N. J. L. 54; *Wescott v. Mitchell*, 95 Me. 377; *Ayers v. C., R. I. & P. R. Co.*, 52 Iowa, 478; *Ellison v. Jackson Water Co.*, 12 Cal. 542; *E. H. M. Co. v. Pringle*, 41 Neb. 265.) The instrument sued upon is not supported by any consideration and is, therefore, not an enforceable contract. (*Sarasohn v. Kamaiky*, 193 N. Y. 203; *Kramer v. Kramer*, 90 App. Div. 176; 181 N. Y. 477; *Johnston v. Spicer*, 107 N. Y. 185; *Borland v. Welch*, 162 N. Y. 104; *Phalen v. U. S. Trust Co.*, 186 N. Y. 178.)

Michael Schneiderman and *Gino C. Speranza* for respondent. The instrument made and executed by defendant on January 16, 1902, is a marriage settlement and the meaning and legality of its provisions should be construed and measured by the rule governing marriage settlements. (*Dickenson v. Seaman*, 193 N. Y. 18; *Gorham v. Fillmore*, 111 N. Y. 251.) The promise of the defendant is a binding contract and is amply sustained by valid considerations: (a) The consummation of the marriage with his daughter; (b) the mutual and reciprocal promise of his wife. (*Sarasohn v. Kamaiky*, 193 N. Y. 203; *Phalen v. U. S. T. Co.*, 186 N. Y. 178; *Kramer v. Kramer*, 90 App. Div. 176; *Buchanan v. Tilden*, 158 N. Y. 109; *Borland v. Welch*, 162 N. Y. 104; *Bouton v. Welch*, 170 N. Y. 554; *Peck v. Vandemark*, 99 N. Y. 29; *Schouler on Domestic Relations*, § 178.)

CARDOZO, J. On January 16, 1902, "articles of agreement" were executed by the defendant Joseph Schweizer, his wife Ernestine, and Count Oberto Gulinelli. The agreement is in Italian. We quote from a translation the part essential to the decision of this controversy: "Whereas, Miss Blanche Josephine Schweizer, daughter

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of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli. Now, in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of Two Thousand Five Hundred dollars, or the equivalent of said sum in Francs, the first payment of said amount to be made on the 20th day of January, 1902." Later articles provide that "for the same reason heretofore set forth," Mr. Schweizer will not change the provision made in his will for the benefit of his daughter and her issue, if any. The yearly payments in the event of his death are to be continued by his wife.

On January 20, 1902, the marriage occurred. On the same day, the defendant made the first payment to his daughter. He continued the payments annually till 1912. This action is brought to recover the installment of that year. The plaintiff holds an assignment executed by the daughter, in which her husband joined. The question is whether there is any consideration for the promised annuity.

That marriage may be a sufficient consideration is not disputed. The argument for the defendant is, however, that Count Gulinelli was already affianced to Miss Schweizer, and that the marriage was merely the fulfilment of an existing legal duty. For this reason, it is insisted, consideration was lacking. The argument leads us to the discussion of a vexed problem of the law which has been debated by courts and writers with much subtlety of reasoning and little harmony of results. There is general acceptance of the proposition that where A is under a contract with B, a promise made by one to the other to induce performance is void. The trouble

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comes when the promise to induce performance is made by C, a stranger. Distinctions are then drawn between bilateral and unilateral contracts; between a promise by C in return for a new promise by A, and a promise by C in return for performance by A. Some jurists hold that there is consideration in both classes of cases (Ames, Two Theories of Consideration, 12 Harvard Law Review, 515; 13 id. 29, 35; Langdell, Mutual Promises as a Consideration, 14 id. 496; Leake, Contracts, p. 622). Others hold that there is consideration where the promise is made for a new promise, but not where it is made for performance (Beale, Notes on Consideration, 17 Harvard Law Review, 71; 2 Street, Foundations of Legal Liability, pp. 114, 116; Pollock, Contracts [8th ed.], 199; Pollock, Afterthoughts on Consideration, 17 Law Quarterly Review, 415; 7 Halsbury, Laws of England, Contracts, p. 385; *Abbott v. Doane*, 163 Mass. 433). Others hold that there is no consideration in either class of cases (Williston, Successive Promises of the Same Performance, 8 Harvard Law Review, 27, 34; Consideration in Bilateral Contracts, 27 id. 503, 521; Anson on Contracts [11th ed.], p. 92).

The storm-centre about which this controversy has raged is the case of *Shadwell v. Shadwell* (9 C. B. [N. S.] 159; 99 E. C. L. 158) which arose out of a situation similar in many features to the one before us. Nearly everything that has been written on the subject has been a commentary on that decision. There an uncle promised to pay his nephew after marriage an annuity of £150. At the time of the promise the nephew was already engaged. The case was heard before ERLE, Ch. J., and KEATING and BYLES, JJ. The first two judges held the promise to be enforceable. BYLES, J., dissented. His view was that the nephew, being already affianced, had incurred no detriment upon the faith of the promise, and hence that consideration was lacking.

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Neither of the two opinions in *Shadwell v. Shadwell* can rule the case at bar. There are elements of difference in the two cases, which raise new problems. But the earlier case, with the literature which it has engendered, gives us a point of departure and a method of approach.

The courts of this state are committed to the view that a promise by A to B to induce him not to break his contract with C is void (*Arend v. Smith*, 151 N. Y. 502; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 562; *Robinson v. Jewett*, 116 N. Y. 40). If that is the true nature of this promise, there was no consideration. We have never held, however, that a like infirmity attaches to a promise by A, not merely to B, but to B and C jointly, to induce them not to *rescind* or *modify* a contract which they are free to abandon. To determine whether that is in substance the promise before us, there is need of closer analysis.

The defendant's contract, if it be one, is not bilateral. It is unilateral (*Miller v. McKenzie*, 95 N. Y. 575). The consideration exacted is not a promise, but an act. The Count did not promise anything. In effect the defendant said to him: If you and my daughter marry, I will pay her an annuity for life. Until marriage occurred, the defendant was not bound. It would not have been enough that the Count remained willing to marry. The plain import of the contract is that his bride also should be willing, and that marriage should follow. The promise was intended to affect the conduct, not of one only, but of both. This becomes the more evident when we recall that though the promise ran to the Count, it was intended for the benefit of the daughter (*Durnherr v. Rau*, 135 N. Y. 219). When it came to her knowledge, she had the right to adopt and enforce it (*Gifford v. Corrigan*, 117 N. Y. 257; *Buchanan v. Tilden*, 158 N. Y. 109; *Lawrence v.*

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Fox, 20 N. Y. 268). In doing so, she made herself a party to the contract (*Gifford v. Corrigan, supra*). If the contract had been bilateral, her position might have been different. Since, however, it was unilateral, the consideration being performance (*Miller v. McKenzie, supra*), action on the faith of it put her in the same position as if she had been in form the promisee. That she learned of the promise before the marriage is a legitimate inference from the relation of the parties and from other attendant circumstances. The writing was signed by her parents; it was delivered to her intended husband; it was made four days before the marriage; it called for a payment on the day of the marriage; and on that day payment was made, and made to her. From all these circumstances, we may infer that at the time of the marriage the promise was known to the bride as well as the husband, and that both acted upon the faith of it.

The situation, therefore, is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they forebore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. The distinction between a promise by A to B to induce him not to break his contract with C, and a like promise to induce him not to join with C in a voluntary rescission, is not a new one. It has been suggested in cases where the new promise ran to B solely, and not to B and C jointly (Pollock, Contracts [8th ed.], p. 199; Williston, 8 Harv. L. Rev. 36). The criticism has been made that in such circumstances there ought to be some evidence that C was ready to withdraw (Williston, *supra*, at pp. 36, 37). Whether that is true of contracts to marry

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is not certain. Many elements foreign to the ordinary business contract enter into such engagements. It does not seem a far-fetched assumption in such cases that one will release where the other has repented. We shall assume, however, that the criticism is valid where the promise is intended as an inducement to only one of the two parties to the contract. It may then be sheer speculation to say that the other party could have been persuaded to rescind. But where the promise is held out as an inducement to both parties alike, there are new and different implications. One does not commonly apply pressure to coerce the will and action of those who are anxious to proceed. The attempt to sway their conduct by new inducements is an implied admission that both may waver; that one equally with the other must be strengthened and persuaded; and that rescission or at least delay is something to be averted, and something, therefore, within the range of not unreasonable expectation. If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result.

The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside. From that moment, there was no longer a real alternative. There was no longer what philosophers call a "living" option. This in itself permits the inference of detriment (*Smith v. Chadwick*, 9

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App. Cas. 187, 196; *Smith v. Land & House Corp.* 28 Ch. D. 7, 16; *Voorhis v. Olmstead*, 66 N. Y. 113, 118; *Fotler v. Moseley*, 179 Mass. 295). "If it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into the contract, it is a fair inference of fact that he was induced to do so by the statement" (BLACKBURN, L. J., in *Smith v. Chadwick, supra*). The same inference follows, not so inevitably, but still legitimately, where the statement is made to induce the preservation of a contract. It will not do to divert the minds of others from a given line of conduct, and then to urge that because of the diversion the opportunity has gone by to say how their minds would otherwise have acted. If the tendency of the promise is to induce them to persevere, reliance and detriment may be inferred from the mere fact of performance. The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.

One other line of argument must be considered. The suggestion is made that the defendant's promise was not made *animo contrahendi*. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its *motive* in the engagement of the daughter to the Count. Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise "unless the parties have dealt with it on that footing" (Holmes, Common Law, p. 292; *Fire Ins. Assn. v. Wickham*, 141 U. S. 564, 579). "Nothing is consideration that is not regarded as such by both parties" (*Philpot v. Gruninger*, 14 Wall. 570, 577; *Fire Ins. Assn. v. Wickham, supra*). But here the very formality of the agreement suggests a purpose to affect the legal relations of the signers. One does not commonly

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pledge one's self to generosity in the language of a covenant. That the parties believed there was a consideration is certain. The document recites the engagement and the coming marriage. It states that these are the "consideration" for the promise. The failure to marry would have made the promise ineffective. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit. Certainly we cannot draw that inference as one of law. Both sides moved for the direction of a verdict, and the trial judge became by consent the trier of the facts. If conflicting inferences were possible, he chose those favorable to the plaintiff.

The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements, and seeks to uphold them. It puts them for many purposes in a class by themselves (*Phalen v. U. S. Trust Co.*, 186 N. Y. 178, 181). It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference (*McNutt v. McNutt*, 116 Ind. 545; *Appleby v. Appleby*, 100 Minn. 408). It strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfilment of engagements designed to influence in their deepest relations the lives of others.

The judgment should be affirmed with costs.

CRANE, J. (concurring). I concur for affirmance and agree with what Judge CARDOZO has said about the law of consideration, but I prefer other reasons for my conclusions in this case.

Marriage settlements are usually made between husband and wife; but marriage settlements by third parties have been recognized by law. (Schouler's Dom. Rel. [5th ed.]

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sec. 178; *Phalen v. U. S. Trust Co.*, 186 N. Y. 178.) The policy of the law to uphold and enforce such contracts is applicable to both classes.

Count Gulinelli and the defendant's daughter being engaged, the defendant, through his lawyer, prepared and executed the agreement in question on the 16th day of January, 1902, and handed it to his prospective son-in-law on the 18th of January, 1902. Two days thereafter Gulinelli and the defendant's daughter were married. This formal document reads in part as follows:

"Whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli.

"Now, in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of Two Thousand Five Hundred dollars, or the equivalent of said sum in Francs, the first payment of said amount to be made on the 20th day of January, 1902."

The only reasonable inference to be drawn from these facts is that this agreement was a marriage settlement made by the father upon his daughter in view of the impending marriage and to take effect upon the marriage. The marriage having taken place, the settlement became binding.

In the *Phalen Case (supra)* it was said by this court: "The strict legal definition of consideration need not here be discussed, since marriage settlements have always been regarded as exceptions to the general rule upon this question." (p. 186.)

If, however, consideration were necessary for this marriage settlement, the marriage was that consideration.

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The parties were not bound by the recitals in the instrument, but could show, by surrounding circumstances and by the natural inferences, the actual consideration. (10 Ruling Case Law, 1042; *Barker v. Bradley*, 42 N. Y. 316, 320; *Wheeler v. Billings*, 38 N. Y. 263, 264; *Arnot v. Erie Railway Co.*, 67 N. Y. 315, 321; *Ferris v. Hard*, 135 N. Y. 354, 363; *Sturmdorf v. Saunders*, 117 App. Div. 762; affd., 190 N. Y. 555.)

This case is similar to *Coverdale v. Eastwood* (L. R. 15 Eq. 121); *Laver v. Fielder* (32 Beav. 1); *Keays v. Gilmore* (Irish Rep. 8 Eq. 290); *Bold v. Hutchinson* (20 Beav. 250), and *Ayliffe v. Tracy* (2 P. Wms. 65).

Romilly's words in *Laver v. Fielder* (*supra*) are pertinent here. "It is of great importance that all persons should understand, that when a man makes a solemn engagement upon an important occasion, such as the marriage of his daughter, he is bound by the promise he then makes. If he induce a person to act upon a particular promise, with a particular view, which affects the interests in life of his own children and of the persons who become united to them, this Court will not permit him afterwards to forego his own words, and say that he was not bound by what he then promised."

The trial court to whom all the facts were submitted was justified in finding that this agreement was a marriage settlement by a father upon his daughter and that it influenced or induced the parties, at least in part, to marry *at the time* they did and was, therefore, a legal agreement.

HISCOCK, Ch. J., CUDDEBACK, POUND and ANDREWS, JJ., concur with CARDEN, J., and CRANE, J., concurs in opinion; COLLIN, J., not voting.

Judgment affirmed.

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Statement of case.

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MARCUS MAYER et al., Respondents, v. ANGELO R. MONZO, Appellant.

Stockbrokers—sale of stocks carried on margin—when sold without reasonable notice to customer, such sale constitutes a conversion—action by stockbrokers to recover sum claimed to be due from customer—when customer may interpose claim for value of his stocks purchased on margins and sold by parties to whom plaintiff had hypothecated them as collateral.

1. A broker intending to sell stocks carried on margin for a customer must give reasonable notice of the time and place of such sale if he would avoid the charge of conversion.

2. A person whose stocks have been converted is entitled to a reasonable time after notice of the conversion within which to determine whether he will purchase other stocks in the place thereof and he may use as a basis for his claim of damages resulting from the conversion the highest prices which have prevailed during such reasonable period.

3. In an action by plaintiffs, who were stockbrokers, to recover a sum claimed to be due them from defendant on the purchase of stocks held by them as collateral, which stocks were sold without notice to defendant by the parties with whom plaintiffs had hypothecated them, defendant sought to establish a counterclaim on the ground that the sale amounted to a conversion and that before he learned of this conversion, about a year later, the value of the stocks had so increased as to create a balance in his favor over and above the amount due thereon. The court dismissed his counterclaim as matter of law, and the plaintiffs attempt to sustain this dismissal by the claim that defendant knew of the conversion at about the time it occurred, and that the value of his stocks then was so low as not to establish any counterclaim which would diminish plaintiffs' recovery as now allowed. Held, that while a jury might find facts charging defendant with knowledge of the conversion at about the time it occurred, and when prices of his stocks were too low to establish a claim which would diminish plaintiffs' recovery, this knowledge could not be imputed as matter of law and that, therefore, it was error to dismiss his counterclaim.

Mayer v. Monzo, 165 App. Div. 910, reversed.

(Argued October 16, 1917; decided November 13, 1917.)

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Points of counsel.

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 31, 1914, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Herbert C. Smyth and Roderic Wellman for appellant. Defendant, in attacking the dismissal of the counter-claim, is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in his favor. (*Place v. N. Y. C. & H. R. R. Co.*, 167 N. Y. 345.) It is only where there is no evidence which, if believed, is legally sufficient to sustain a verdict, that the court is called upon to nonsuit or dismiss a counterclaim. (*McDonald v. Metropolitan S. R. Co.*, 167 N. Y. 66.) The credibility of witnesses is always a question for the jury, unless it can be shown by science and common knowledge that their testimony must be absolutely false. (*Walters v. Syracuse R. T. Ry. Co.*, 178 N. Y. 50.) There was legally sufficient evidence of conversion by wrongful sale. (*Small v. Housman*, 208 N. Y. 115; *Toplitz v. Bauer*, 161 N. Y. 325.)

William F. Goldbeck for respondents. There was no question for the jury. (*Smith v. Savin*, 141 N. Y. 315; *Colt v. Owens*, 90 N. Y. 368; *Minor v. Beveridge*, 141 N. Y. 399; *Mullen v. Quinlan*, 195 N. Y. 109; *Barber v. Ellingwood*, 135 App. Div. 549; *Wright v. Bank of Metropolis*, 110 N. Y. 249; *Griggs v. Day*, 158 N. Y. 1.) No damage resulted to defendant from the sale by the banks. His actual knowledge of plaintiffs' failure put him upon notice that his stocks were thereby placed in jeopardy, whether an immediate sale of them took

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place or not, and knowing the condition of his account, he knew that there were but two ways open to him to protect himself: (1) To tender his debit balance and redeem the stocks, or (2) replace them by purchase in the open market. Having done neither, he cannot hold plaintiffs on the theory of conversion, except for such damages as accrued within a reasonable time after this opportunity to act had been afforded him. Under the law, it was his duty to act promptly and within a reasonable time. (*Wright v. Bank of Metropolis*, 110 N. Y. 249; *Griggs v. Day*, 158 N. Y. 1; *Burnham v. Lawson*, 118 App. Div. 389.) No conversion of any kind was committed by plaintiffs, as against the defendant, or of which the defendant has any right to complain. (*Markham v. Jaudon*, 41 N. Y. 235.)

HISCOCK, Ch. J. This action is brought by plaintiffs, who were stockbrokers, to recover a substantial sum of money claimed to be due to them from defendant on account of the purchase of stocks bought and carried by them for him on a margin and for such an amount they have recovered judgment. It is undisputed that this recovery was proper unless defendant was entitled to assert the counterclaim pleaded by him springing out of the alleged conversion of his stocks by the plaintiffs. This counterclaim thus far has been rejected by the courts as matter of law and the question whether this disposition was correct involves an examination of the facts making up and arising out of the relation between the parties in respect of the stocks in question.

Defendant opening his account with the plaintiffs in 1906, prior to October 22, 1907 had purchased several thousand shares of stock on margin, with the result that on that date plaintiffs were carrying for him 1,900 shares of stock which were worth about \$40,000 less than the amount due thereon. These shares with those of

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other customers had been pledged by the plaintiffs with various banks to secure their loans and it does not appear that defendant's stocks had in any manner been segregated from those of other people thus pledged or that any arrangement had been made between the plaintiffs and the banks by which defendant should receive notice of the time and place of any sale which the banks might be authorized to make, or that a like amount and kind of securities were retained by plaintiffs for delivery to defendant on payment of the amount due from him.

October 22, 1907, plaintiffs suspended on the Stock Exchange and made an assignment for the benefit of creditors. These proceedings were followed by involuntary proceedings in bankruptcy against them wherein a receiver was appointed who took possession of their property. Soon after these proceedings and prior to December 1, 1907, the various banks holding stocks pledged by plaintiffs and including those belonging to the defendant, made sales thereof and of these sales no notice was given the defendant. About six months after their failure, the plaintiffs having settled with their creditors, resumed business.

We think that the sale of the stock under the circumstances amounted to a conversion. The general rule is well settled that a broker intending to sell the stocks of a customer carried on margin must give reasonable notice of the time and place of such sale if he would avoid the charge of conversion. (*Content v. Banner*, 184 N. Y. 121; *Small v. Housman*, 208 N. Y. 115.) The further rule must follow that if a broker for his own indebtedness has rehypothecated his customer's stocks with another, he will not, under such circumstances as appear in this case, be relieved of the obligation to give notice to the customer of the proposed sale of the latter's stock by the new pledgee, and if this notice is not given the broker again will be chargeable with conversion. (*Roths-*

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child v. Allen, 90 App. Div. 233.) Concededly no such notice as this was given.

It seems to have been held in this action and is now urged that the conversion of defendant's stocks occurred when the plaintiffs made their assignment or when bankruptcy proceedings were instituted against them, and that, therefore, there could have been no conversion when the sales by the banks occurred, and to which alleged conversion defendant's claims are now limited. We do not agree with this proposition. At the time the assignment was made and the bankruptcy proceedings were instituted, apparently defendant's stocks had already passed out of the possession of the plaintiffs and neither the assignee nor the receiver in bankruptcy ever took possession of the same. The voluntary assignment would be regarded as conveying only property which belonged to the plaintiffs and, therefore, it would not include defendant's stock, and the proceedings in bankruptcy so far as they proceeded were of an involuntary character which it does not seem to us would constitute a conversion by the plaintiffs.

Even so, however, it is alleged that the judgment dismissing defendant's counterclaim as a matter of law was properly made because he suffered no damages from the conversion. While we think a jury might find facts which would sustain this contention, we do not think that it can be upheld as a matter of law.

The rule is that a person whose stocks have been converted is entitled to a reasonable time after notice of the conversion within which to determine whether he will purchase other stocks in the place thereof and that he may use as a basis for his claim of damages resulting from the conversion the highest prices which have prevailed during such reasonable period. (*Baker v. Drake*, 53 N. Y. 211.) It has been held under varying circumstances that thirty days or fifteen days or sixty days

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would be such reasonable period. (*Colt v. Owens*, 90 N. Y. 368; *Wright v. Bank of the Metropolis*, 110 N. Y. 237; *Minor v. Beveridge*, 141 N. Y. 399; *Mullen v. Quinlan & Co.*, 195 N. Y. 109.)

The defendant, relying upon this rule, says that he did not receive notice of the sale of his stocks for more than a year after it had occurred, and that taking advantage of the highest prices which prevailed within that period for stocks of the kind carried for him by the plaintiffs he is entitled to an amount of damages which not only would wipe out plaintiffs' claim, but in addition would give him judgment for a substantial amount against them. His conclusions are doubtless correct if it is to be assumed that he neither received nor was chargeable with notice or knowledge of the sale of his stocks until the time fixed by him. We think, however, upon the evidence as it is now presented to us that a jury might find facts which would charge him with knowledge of the sale of his stocks as of about the date when the same occurred.

Defendant was a man of mature years and of a business experience extensive and successful enough so that he had accumulated a substantial amount of property. He opened his stock account with the plaintiffs a year or so before the latter's failure and during that time had dealt in about 10,000 shares of stock which were carried for him on margin. As early as August, 1907, he knew that the value of his stocks had so depreciated that he already owed the plaintiffs a large balance over and above their value, and he was pressed by the latter to put up additional margins which he failed to do. He knew of plaintiffs' suspension and failure at or about the time the same occurred; that a receiver had taken possession of their office, and that presumably any property which they held had passed into the possession of others. He also knew that an acute and wide-spread panic was

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prevailing in the stock market resulting in constant declines in the value of stocks, and that his stocks were subject to sale for the payment of the indebtedness due on account of the purchase price thereof.

Notwithstanding these facts, with the knowledge of which he might be charged by a jury, he made no inquiries concerning the location or disposition of his stocks, but purposely refrained from taking any steps in relation to the latter on the theory and with the purpose that he might thereby be relieved from putting up more money on account thereof, and that the plaintiffs might be held responsible for his stocks until prices had appreciated and he was able to escape from his venture without loss.

Of course the defendant swears to some facts different than these, but a jury is not compelled to believe statements so unnatural as to seem incredible simply because some interested witness has sworn to them, and we think that upon the facts which we have recited and others, it would be permissible for a jury to find that the defendant was possessed of or chargeable with such knowledge and notice of the sale of his stocks about the time the same were sold as would set running the period within which he would be compelled to determine what course he would pursue and which would fix the limit of prices which could be used as a basis for any claim of damages against plaintiffs for the conversion. (*Williamson v. Brown*, 15 N. Y. 354, 360; *Hall v. Paine*, 224 Mass. 62; *Rochester Savings Bank v. Averell*, 96 N. Y. 467, 473; *Baker v. Bliss*, 39 N. Y. 70, 74; *Kirsch v. Tozier*, 143 N. Y. 390, 397; *Reed v. Gannon*, 50 N. Y. 345, 350; *Higgins v. Crouse*, 147 N. Y. 411, 415.)

If we are right in this, and a jury should take the view of defendant's conduct which we think it would be permitted to, it might result, as plaintiffs claim, that the defendant would not be able to recover any damages on his counterclaim, for, as said, the prices of stocks declined

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rather than advanced within the period which has been suggested. Still we think that the disposition of the counterclaim involves the submission of the question which has been outlined to the jury and that it was error for the court to dismiss the same as a matter of law.

The judgment, therefore, should be reversed and a new trial granted, with costs to abide event.

COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

HELEN KLEIN, Appellant, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Respondent.

Evidence — witness — construction and application of section 834 of Code of Civil Procedure — action on life insurance policy — when plaintiff in proofs of death of insured refers to death certificate of a hospital physician and agrees that it shall be part of the proofs of death, such certificate is admissible in evidence upon the trial and the testimony of the attending physician is not incompetent under section 834.

1. Section 834 of the Code of Civil Procedure is not intended to prohibit a person from testifying to such ordinary incidents and facts as are plain to the observation of any one without expert or professional knowledge, and without tacitly or otherwise inviting or receiving confidences by which the incidents or facts are or may be brought to light and obtained. (*Patten v. United Life & Accident Insurance Association*, 133 N. Y. 450, 453, followed.)

2. The plaintiff's husband made written application to the defendant company for a policy of insurance on his life payable to the plaintiff. In his application he declared that "the said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described in this application." At the time of making such application he made a small payment to the defendant's agent and received a receipt therefor, in which it was stated that the payment "is in no way binding upon the said company except

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that said company agrees to return the amount mentioned herein in case the company declines to grant a policy on the life of said applicant." The policy was afterward handed to the applicant and the agent received the unpaid premium. Testimony was received from the physician who attended the deceased on the day previous to the receipt of this premium that he was then sick, and the plaintiff certified that her husband's health was first affected two days before payment of the premium. In answer to the question, "What was the cause of his death?" she referred to the death certificate made by a physician and in her certificate with reference to the death of the insured, says, "It is agreed that such certificate shall be considered as part of proof of death of insured." Held, that no error was committed in allowing the testimony given by the attending physician that deceased was sick when he attended him; that the testimony of plaintiff with reference to the death certificate of the physician made such certificate admissible in evidence as an admission against her for what it was worth and that the receipt of the proofs of death under the circumstances disclosed by the record was not error.

Klein v. Prudential Ins. Co., 165 App. Div. 986, affirmed.

(Argued October 26, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1914, affirming a judgment in favor of defendant entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Otto H. Droege for appellant. It was error to receive the testimony of the physician who attended the deceased during his lifetime in his professional capacity. (*Meyer v. Knights of Pythias*, 178 N. Y. 63; *Holden v. Met. L. Ins. Co.*, 165 N. Y. 13.)

Alfred M. Bailey for respondent. It was not error to admit the evidence of Dr. Schoen. (*Patten v. United Life & Acc. Ins. Assn.*, 133 N. Y. 450; *Jennings v. Metropolitan Life Ins. Co.*, 81 App. Div. 85; *Becker v. Metropolitan Life Ins. Co.*, 99 App. Div. 9; *Meyer v.*

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Knights of Pythias, 178 N. Y. 63; *Matter of Newcomb*, 192 N. Y. 238.) The record presents no evidence of waiver by defendant of the conditions precedent contained in the policy, and there was nothing on that question to submit to the jury. (*Russell v. Prudential Ins. Co.*, 176 N. Y. 178; *Hewitt v. American Union Life Ins. Co.*, 66 App. Div. 80; *Poste v. American Union Life Ins. Co.*, 32 App. Div. 109; 165 N. Y. 631; *Giddings v. Northwestern Mutual Life Ins. Co.*, 102 U. S. 108.)

CHASE, J. On January 6, 1913, the plaintiff's husband made written application to the defendant company for a policy of insurance on his life payable to the plaintiff, the premium for which was thirteen dollars payable quarterly in advance. In his application he declared "That the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, the said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described in this application."

At the time of making such application he paid to the defendant's agent two dollars, and received a receipt therefor, in which it was stated that the payment "is in no way binding upon the said company except that said company agrees to return the amount mentioned herein in case the company declines to grant a policy on the life of said applicant."

On January 9 he passed the required medical examination and a policy was issued on January 15. The policy was handed to the applicant but he was unable to pay the premium therefor, and the agent told him that he was not insured until the balance of the first quarterly premium was paid. From that time until February 14 the agent repeatedly called upon the applicant for the unpaid premium but it was not paid. On the morning

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of February 14 the agent received the unpaid premium by direction of the applicant at the house of his (applicant's) brother-in-law. On February 12 the applicant had a cold and a slight cough. At twelve o'clock on that day he said to his employer that he was not feeling very well and might stay at home an hour longer than usual but would be back in the afternoon. He never returned to his work. On February 13 he was attended at his home by a physician. He was then sick. He was taken to a hospital on the morning of February 14, and died there of pneumonia February 20.

The plaintiff signed a certificate in proof of her husband's death and it was delivered to the defendant accompanied by a certificate of the physician who attended him at the hospital. In her certificate she states that her husband's health was first affected February 12, and in answer therein to the question "What was the cause of his death?" she referred to the physician's certificate. She also states in the certificate that it is agreed that the certificate of the physician "shall be considered as part of proofs of death of insured."

This action was brought upon the policy and the defendant alleged as a defense that when the first premium was paid to the company the applicant's health was not the same as described in his application and that such fact was not then known to the defendant. The question as to whether his health was the same as described in the application was submitted to the jury and the jury found in favor of the defendant. The judgment entered upon such verdict has been unanimously affirmed by the Appellate Division. There are but two questions of law presented to us by the appellant:

1. Whether it was error to receive the testimony of the physician who attended the deceased on February 13, that he was then sick.

2. Whether it was error to admit in evidence the

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affidavit and certificate of the hospital physician accompanying the certificate made by the plaintiff as a part of the proofs of her husband's death.

The prohibition against a physician giving evidence of matters within his knowledge relating to a patient, is statutory. It is confined to information acquired in attending a patient in a professional capacity and which is necessary to enable him to act in that capacity. (Code of Civil Procedure, sec. 834; *People v. Koerner*, 154 N. Y. 355, 366; *People v. Austin*, 199 N. Y. 446, 452.)

The Code section is not intended to prohibit a person from testifying to such ordinary incidents and facts as are plain to the observation of any one without expert or professional knowledge, and without tacitly or otherwise inviting or receiving confidences by which the incidents and facts are or may be brought to light and obtained. It was, therefore, said by Judge EARL with the approval of all the members of this court in *Patten v. United Life & Accident Insurance Association* (133 N. Y. 450, 453): "There is nothing in section 834 which prohibited the defendant from showing that Patten was the patient of the doctor; that he attended him as a patient, and that he was sick. Nor is there anything in that section which prohibited the doctor from testifying whether he was called upon to attend Patten professionally before or after the date of the certificate, or to tell how many times he attended him, whether daily or hourly, from the 19th day of April to the 16th day of May."

The *Patten* case has been frequently followed with approval by the trial and other courts in this state. (*Becker v. Met. Life Ins. Co.*, 99 App. Div. 5, 9; *Jennings v. Supreme Council L. A. B. Assn.*, 81 App. Div. 76, 85; *McGillicuddy v. Farmers L. & T. Co.*, 26 Misc. Rep. 55, 60; *Denaro v. Prudential Ins. Co.*, 154 App. Div. 840, 842; *Hammerstein v. Hammerstein*, 74 Misc. Rep. 567.) The *Patten* opinion has been substantially quoted and approved

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in Encyclopedia of Evidence, volume 10, page 128; Wigmore on Evidence, volume 4, section 2384, and note; The Modern Law of Evidence, Chamberlayne, volume 5, section 3705, and notes.

When the information obtained by a physician extends to the existence of an ailment although not the subject of his attendance or treatment but is acquired through an examination of the patient in attending him in a professional capacity and the discovery of which was a necessary incident to the investigation made to enable him to act in his professional capacity, it is within the language and purpose of the Code prohibition. (*Nelson v. Village of Oneida*, 156 N. Y. 219.)

We do not think that error was committed in allowing the attending physician to answer the questions propounded to him. In any case the evidence that the applicant was sick on the day before he was taken to the hospital appears almost, if not entirely, beyond controversy by testimony other than that of the attending physician. The statement of the plaintiff in her certificate as a part of the proofs of death that her husband's health was first affected on February 12 is an important admission in favor of the defendant's contention. Her reference therein to the certificate of the hospital physician made such certificate admissible in evidence as an admission against her for what it was worth. If it appears therefrom to have been based in whole or in part on hearsay evidence or on confidential communications made to him by the deceased and the plaintiff desired to prevent its being considered in evidence she should have objected to it on that ground or have made a motion to strike it from the record. The receipt of the proofs of death under the circumstances disclosed by the record was not error.

The question of waiver by the defendant does not arise as in *McClellan v. Mut. L. Insurance Co.* (217 N. Y. 336),

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as it does not appear that the defendant or its agent acting in its behalf knew or were put upon inquiry as to the condition of health of the defendant's husband on the morning of February 14, when the premium was paid.

The judgment should be affirmed, with costs.

CRANE, J. I concur in so far as the affirmance is placed upon the ground that the admission of the physician's testimony, even if it were incompetent, was harmless error. It is virtually admitted that the insured was taken sick on February 13th, the day before the first premium upon the policy of insurance was paid in full, and, therefore, the physician's testimony added nothing to the fact.

HISCOCK, Ch. J., COLLIN and CARDENZO, JJ., concur with CHASE, J., and HOGAN and CRANE, JJ., concur also in memorandum by CRANE, J.; McLAUGHLIN, J., not sitting.

Judgment affirmed.

In the Matter of the Estate of JOHN P. COLEGROVE,
Deceased.

FRANK H. COLEGROVE et al., Appellants and Respondents; EDWIN F. HOY, as Executor of and Trustee under the Will of JOHN P. COLEGROVE, Deceased, et al., Respondents and Appellants.

Will — testamentary trusts — an ulterior limitation, although invalid, will not be allowed to invalidate the primary provision, but will be cut off if the trust is not an entirety — provisions of will creating a trust construed.

1. An ulterior limitation in a will creating a trust, though invalid, will not be allowed to invalidate the primary disposition of the will, but will be cut off in the case of a trust which is not an entirety.

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2. Testator bequeathed \$15,000 to his trustee to apply the income thereof to the use of his three grandchildren during their minority and directed the trustee to pay over to said grandchildren, as each arrived at the age of twenty-one years, the equal one-third part of said trust fund to be theirs absolutely, and in the event of the death of any of his grandchildren, before attaining the age of twenty-one years, with issue, he bequeathed the share, to which the deceased grandchild would have been entitled at majority, to the issue of such grandchild. That in the event of the death of any grandchild before reaching majority without issue, the trustee should apply the income of the share of the deceased grandchild to the use of the survivor or survivors of his grandchildren until they should attain majority when the trust fund should be disposed of in whole or equal shares as the case might be in accordance with the previous provisions. *Held*, that the last mentioned provision is in violation of the statute (Personal Property Law, § 11; Cons. Laws, chap. 41) as rendering it possible to suspend the power of alienation for longer than two lives in being. *Held, further*, that said illegal provision can, and should, be eliminated from the will so that there remains for each of the grandchildren a trust fund of \$5,000, to be disposed of as in the third clause provided, and upon the death of any beneficiary before twenty-one leaving issue, the principal sum goes to his issue absolutely, and should the beneficiary die under twenty-one without issue, the trust ends and the principal sum falls into the residuary estate.

Matter of Colegrove, 179 App. Div. 961, reversed.

(Argued October 5, 1917; decided November 13, 1917.)

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 3, 1917, which modified and affirmed as modified a decree of the Cattaraugus County Surrogate's Court admitting to probate and construing the will of John P. Colegrove, deceased.

John P. Colegrove, of the city of Salamanca, state of New York, on the 22d day of July, 1915, made and executed his last will and testament wherein he created a trust or trusts as follows:

"Third. I give and bequeath unto Edwin F. Hoy, the sum of fifteen thousand dollars (\$15,000) in trust

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to be invested by him in such a manner as he deems best and to collect and receive the income and profits therefrom, and apply them to the use of my grandchildren, Phillip Brooks Nichols, Helen Nichols and Mary Terry, during their minority; and as such shall attain majority, I direct my said trustee to divide, pay over and deliver unto the one so reaching the age of twenty-one years, the equal one-third part of said trust fund and accrued income thereon, to be theirs absolutely and forever.

“Fourth. In the event of the death of any of the beneficiaries of the trust created in the third paragraph of this, my will, before attaining the age of twenty-one years, with issue, then I give and bequeath unto said issue absolutely at the time of the death of said beneficiary, the share to which beneficiary would be entitled at majority, but if any of the said beneficiaries die before the age of twenty-one years without issue, then I direct my said trustee to apply the income and profits thereof, to the use of the survivor or survivors of said beneficiaries; until said survivor or survivors shall attain majority, when my said trustee shall dispose of said trust fund in whole or in equal shares as the case may be, in accordance with the provisions of the third paragraph of this, my will.

“Fifth. In case all of the beneficiaries of the trust created in the third paragraph of this, my will, should die without issue, before they attain their majority, then I direct that said trust fund shall be a part of my residuary estate and shall pass in accordance with the provisions of the residuary clause hereinafter expressed.

“Sixth. I give, devise and bequeath all the rest, residue and remainder of my property, both real, personal, and mixed, of every kind and nature and wheresoever situate, of which I may die seized or possessed, unto my wife, Salina P. Colgrove, and unto my daughters, Helen Mae Nichols and Nellie J. Terry, share and share

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alike, and their heirs forever, except as hereinafter provided."

The will was admitted to probate on the 24th day of July, 1916, the surrogate reserving decision as to the validity and construction of the third, fourth, fifth and sixth paragraphs thereof. On the 6th day of January, 1917, it was adjudged and decreed by the surrogate that the third, fourth and fifth paragraphs were invalid, null and void, as a violation of section 11 of the Personal Property Law, in suspending the absolute ownership of the trust fund for a longer period than two lives in being at the death of the testator.

The Appellate Division affirmed this decree and construction with a slight modification disallowing costs to the contestants.

Henry Donnelly for Frank H. Colegrove et al., appellants and respondents. The \$15,000 trust fund given to Edward F. Hoy, as trustee, pursuant to the terms of the will of the late John P. Colegrove, is null and void and in violation of section 11 of the Personal Property Law of the state of New York. (*Matter of Wilcox*, 194 N. Y. 288; *Schettler v. Smith*, 41 N. Y. 334; *Haynes v. Sherman*, 117 N. Y. 433; *Central Trust Co. v. Eggleston*, 185 N. Y. 23; *Garvey v. McDevitt*, 72 N. Y. 566; *Underwood v. Curtis*, 127 N. Y. 523; *Bailey v. Buffalo L. & T. Co.*, 132 N. Y. Supp. 514; *Matter of Raab*, 139 N. Y. Supp. 869; *Davis v. McMahon*, 146 N. Y. Supp. 657; *Schlereth v. Schlereth*, 173 N. Y. 444.) Under the provisions of the will, the testator made the trust fund a part of the residuary estate only on one condition, that is, the death of the three legatees before they arrived at the age of twenty-one years without issue. Now, if the bequest fails entirely by operation of law so that the will itself cannot act upon it, then it is a residuary undisposed of, and the failure of a part of the disposition

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of the residuary estate will not augment the shares of the other residuary legatees. When there is such a failure there results a residue of a residue, and the rule is well settled that it will not be added, but will pass to the heirs or next of kin. (*Beekman v. Bonsor*, 23 N. Y. 298; *Kerr v. Dougherty*, 79 N. Y. 327; *Booth v. Baptist Church*, 126 N. Y. 215; *Morton v. Woodbury*, 153 N. Y. 243.)

George H. Ansley for *Edwin F. Hoy*, as executor and trustee, et al., respondents and appellants. Assuming the trust attempted to be created by the testator in paragraphs 3, 4 and 5 of the will to be invalid, the fund then passes to the residuary legatees by virtue of paragraph 6 of the will, which is a general residuary clause. (*Leggett v. Stevens*, 185 N. Y. 70; *Matter of Benson*, 96 N. Y. 499; *Matter of Barrett*, 132 App. Div. 134; *Brooklyn Trust Co. v. Phillips*, 134 App. Div. 697; 201 N. Y. 561.) The trust created by the 3d, 4th and 5th paragraphs of the will is a valid trust and is not in violation of section 11 of the Personal Property Law, unlawfully suspending the absolute power of alienation. (*Leach v. Godwin*, 198 N. Y. 35; *Jacoby v. Jacoby*, 188 N. Y. 124; *Orr v. Orr*, 147 App. Div. 753; 212 N. Y. 615.)

CRANE, J.: The principal trust provisions of this will can be upheld, discarding such as are illegal. The rule is quite well settled that an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but will be cut off in the case of a trust which is not an entirety. (*Tiers v. Tiers*, 98 N. Y. 568, 573; *Kalish v. Kalish*, 166 N. Y. 368, 375; *Hascall v. King*, 162 N. Y. 134, 152.)

The testator intended three separate and distinct trusts of five thousand dollars each for his three grandchildren. The fact that the trusts were to be kept in one fund does not necessarily create one trust. (*Leach v. Godwin*,

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198 N. Y. 35.) The direction to pay over five thousand dollars to the grandchild becoming twenty-one years of age suggests separate trusts.

Reading this will as applicable to separate trusts of five thousand dollars for each grandchild, it directs the income to be paid to the grandchild until he becomes twenty-one years of age, when he is to receive the principal. In the event of the beneficiary's death before attaining twenty-one leaving issue, then the principal is given to the issue absolutely.

Up to this point the trusts can be sustained. The latter part of the fourth paragraph, however, contains limitations which cannot be upheld. It directs that if any of said beneficiaries die before the age of twenty-one years without issue, then the trustee shall apply the income and profits thereof to the use of the survivor or survivors of said beneficiaries until said survivor or survivors shall attain majority, when the trustee shall dispose of the trust fund, in whole or in equal shares as the case may be, in accordance with the third paragraph of the will.

These clauses taken in connection with other parts of the will indicate an intention upon the part of the testator to keep the trust fund, in the event stated, tied up until the youngest of the three grandchildren arrives at twenty-one. This, of course, is in violation of section 11 of the Personal Property Law (Cons. Laws, ch. 41), as rendering it possible to suspend the absolute power of alienation for longer than two lives in being.

Eliminating from the will this illegal portion, there remains for each of the grandchildren a trust fund of five thousand dollars, the income from which is to be paid until the beneficiary arrives at twenty-one when the principal sum is to be turned over to him absolutely and forever. Upon the death of the beneficiary before twenty-one leaving issue, then said principal sum is given

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to the issue absolutely. Should the beneficiary die under twenty-one and without issue, the trust ends and the principal sum falls into the residuary estate under the sixth paragraph of the will. The sixth paragraph is a general residuary clause carrying everything not otherwise disposed of. (*Leggett v. Stevens*, 185 N. Y. 70.)

The order of the Appellate Division and the decree of the surrogate should be reversed and the matter remitted to the Surrogate's Court for decree in accordance with this opinion, with one bill of costs to the executor and special guardian in this court and in the Appellate Division, payable out of the estate.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and McLAUGHLIN, JJ., concur.

Order reversed, etc.

WILLIAM E. WHITE, Appellant, v. NATHAN SCHWEITZER et al., Respondents.

Sale — what constitutes a purchaser's acceptance of goods shipped to him in pursuance of a contract of sale — what purchaser must do to reject goods if they do not conform to the contract — when question of acceptance by purchaser one of fact to be determined by a jury.

1. Whether a purchaser's retention, sale or disposition of property constitutes an acceptance must be determined, as a general rule, as a question of fact. If the article purchased is not in accordance with the contract, then the purchaser must, upon discovering that fact, do nothing inconsistent with the vendor's ownership.

2. Mere complaint by the vendee that the goods do not come up to the contract does not amount to a rejection. If the goods received do not conform to the contract, as to quality or kind, the purchaser must, as a general rule, within a reasonable time after such facts have been ascertained, return or offer to return them. In case the goods are in such condition that they must be speedily disposed of or else there will be a total loss, then there is an exception which permits the purchaser to dispose of them, but this exception only

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applies when the seller cannot be communicated with and instructions from him quickly obtained.

3. Defendants purchased from plaintiff's assignor a carload of turkeys to be, as found by the jury, "dry picked." When the car arrived it was discovered that the turkeys had been "scalded" instead of "dry picked" and that they were in bad condition. Defendants at once wired plaintiff's assignor stating these facts and asked instructions. Later they again wired "Have turned car over to house that can sell such stuff." Neither telegram was answered by plaintiff's assignor although both were received by it. Defendants also wrote the vendor saying in substance that in the event of any deficiency in the sale, they would expect the vendor to make good. *Held*, that it was error for the trial court to charge that there was no evidence upon which the jury could find that the defendants accepted the turkeys, and also erred in instructing the jury that they must find a verdict for the defendants if the contract was for dry picked turkeys, since such instruction also withdrew from the jury the question of an acceptance.

White v. Schweitzer, 163 App. Div. 898, reversed.

(Argued November 2, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 7, 1914, affirming a judgment in favor of defendants entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Hartwell Cabell for appellant. The trial court erred in charging the jury that as a matter of law there was no evidence upon which it could find that the defendants accepted the turkeys. (*Norton v. Dreyfuss*, 106 N. Y. 90; *Isbell-Porter Co. v. Heineman*, 126 App. Div. 713; Williston on Sales, § 483; *Brown v. Foster*, 108 N. Y. 387; *Levison v. Seybold Mach. Co.*, 22 Misc. Rep. 327; *Kienle v. Klingman*, 24 Misc. Rep. 708; *Burrowes v. Rapid Safety Co.*, 97 N. Y. Supp. 1048; *Mason v. Smith*, 130 N. Y. 474; *Duluth Log Co. v. Hill Lumber Co.*, 110 Minn. 124; *Hitchcock v. Griffin-Skelly Co.*, 99 Mich.

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447.) The court erred in charging the jury that if they found that the plaintiff sold to the defendants dry picked turkeys then they must find a verdict for the defendants. (*Burrowes v. Rapid Safety Co.*, 97 N. Y. Supp. 1048; *Mason v. Smith*, 130 N. Y. 474; *Littlejohn v. Shaw*, 159 N. Y. 188.)

Max D. Steuer for respondents. A vendee of perishable goods arriving from a distant state in a decaying condition may become, for the purpose of sale thereof, the agent of the vendor, *ex necessitate rei*, particularly when the vendee has paid the freight charges and has advanced to the vendor \$1,000 on account of the purchase price. (2 *Corpus Juris*, 460, § 67; *Sands v. Taylor*, 5 Johns. 393; *Buch v. Levy*, 18 J. & S. 519; *Straus v. Nat. Parlor Furniture Co.*, 76 Miss. 343; *Descalzi v. Sweet*, 75 Atl. Rep. 308; *Hitchcock v. Griffin-Skelly Co.*, 99 Mich. 447; *Jones v. Bloomgarden*, 143 Mich. 326; *Rubin v. Sturtevant*, 80 Fed. Rep. 930; *Little Rock Grain Co. v. Brubaker*, 89 Mo. App. 1; *Youghiogheney Iron & Coal Co. v. Smith*, 66 Penn. St. 340; *Columbian Iron Works v. Douglas*, 84 Md. 44.) A non-committal vendor of decaying poultry is entitled to no more notice of a proposed resale for his account by the vendee than the exigencies of the case permit. (Benj. on Sales [5th ed.], 950; *Ullman v. Kent*, 60 Ill. 271; *Van Brocklen v. Smeallie*, 140 N. Y. 70; *Lewis v. Greider*, 49 Barb. 606; 51 N. Y. 231; *Mann v. National Linseed Oil Co.*, 94 Hun, 558; *Brown v. Nelson*, 66 Vt. 660.)

McLAUGHLIN, J. The action was brought to recover the purchase price of a carload of turkeys shipped by plaintiff's assignor, the Keystone Commercial Company, from Maysville, Ky., to the defendants in New York city. They were shipped on November 17th and arrived November 23, 1908. There was a dispute between the parties as to the terms of sale, that is, whether the turkeys were to

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be "dry picked" or "scalded." Those shipped were scalded and the verdict has settled the disputed question in favor of the defendants. When the car arrived in which the shipment was made the turkeys were examined by defendants and it was then discovered they were scalded instead of dry picked, and also that they were in bad condition. About half-past seven o'clock in the morning of that day the defendants wired plaintiff's assignor at Maysville: "Your car arrived scalded instead of dry picked. Stock sticky and cannot use it. Wire instructions." About two hours later on the same day, not having received an answer to the first telegram, they sent another, saying: "Having railroad inspector examine car. Will put in claim for you. Have turned car over to house that can sell such stuff." Both telegrams were delivered to plaintiff's assignor at the same time and neither of them was answered. At the time the second telegram was sent defendants delivered the turkeys to commission merchants for sale and the same were on that day sold for \$729.69, which sum was subsequently tendered to the plaintiff's assignor and by it refused. At the time the turkeys were delivered to the commission merchants, one of the defendants wrote plaintiff's assignor, confirming the telegrams, and saying among other things: "I do not know just how I will make out with the sale of these goods, but in the event of any deficiency I will expect you to make good."

The principal question presented upon the appeal is whether the trial court erred in charging the jury, to which an exception was taken, that there was no evidence upon which it could find that the defendants accepted the turkeys. I am of the opinion the exception was well taken. (*Harrison v. Scott*, 203 N. Y. 369; *Norton v. Dreyfuss*, 106 N. Y. 90; *Isbell-Porter Co. v. Heineman*, 126 App. Div. 713.) It is not at all times easy to determine whether a purchaser's retention, sale or disposition

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of property constitutes an acceptance, but as a general rule it must be determined as a question of fact. (Burdick on Sales [3d ed.], 155.) It may be and usually is indicated by exercising acts of ownership, *e. g.*, where one resells the goods, as such action would be improper except on the assumption that the buyer had acquired title; that necessarily indicates an assent on the part of the buyer to become the owner. (Williston on Sales, sec. 483.) If the article purchased is not in accordance with the contract, then the purchaser must, upon discovering that fact, do nothing inconsistent with the vendor's ownership. (*Brown v. Foster*, 108 N. Y. 387; *Duluth Log Co. v. Hill Lumber Co.*, 110 Minn. 124.) So, it has been held that an acceptance is made out by action of the vendee in insuring the goods or offering to mortgage them (*Georgia Refining Co. v. Augusta Oil Co.*, 74 Ga. 497), or by loaning them (*Hensen v. Beebe*, 111 Iowa, 534), or by directing an agent to sell them (*Brown v. Nelson*, 66 Vt. 660), or, while disclaiming a purchase, permitting a third person to select and retain a portion of the goods upon his promise to account to the seller for them. (*Bartholomae & Co. v. Paull*, 18 W. Va. 771.) Mere complaint by the vendee that the goods do not come up to the contract does not amount to a rejection. Something more is required. If the goods received do not conform to the contract as to quality or kind, the purchaser must, as a general rule, within a reasonable time after such facts have been ascertained, return or offer to return them. (*Mason v. Smith*, 130 N. Y. 474.) In case the goods are in such condition that they must be speedily disposed of or else there will be a total loss, then there is an exception to the general rule which permits the purchaser to dispose of them. This right is implied from the necessity of the case and to make the loss as small as possible. But the exception only applies where the seller cannot be com-

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municated with and instructions from him quickly obtained.

Applying the rule laid down in the authorities cited to the evidence adduced at the trial it at once becomes apparent that the question of acceptance was at least one of fact. It might well be doubted whether the uncontradicted facts did not show as matter of law an acceptance. (*Benjamin on Sales* [5th ed.], p. 752; *Leggett & Myer Tobacco Co. v. Collier, Robertson & Hambleton*, 89 Iowa, 144.) That question, however, is not presented on the appeal and we do not pass upon it. The defendants ascertained, about seven o'clock on the morning of the 23d, when the goods were received, that the quality did not correspond to what they had purchased. They communicated that fact by a telegram to the seller, but did not state that they refused to receive or offer to return them; on the contrary, without waiting until an answer to the telegram could be received from the seller (at most three or four hours) they proceeded to treat the goods as their own by delivering them to commission merchants for sale and so informed the seller. Respondents suggest that the seller did not answer either telegram. There was no necessity for its doing so. Both telegrams were received at the same time and the second was to the effect that the goods had then been disposed of.

For the reasons stated it follows that the court also erred in instructing the jury they must find a verdict for the defendants if the contract was for dry picked turkeys. Such instruction also withdrew from the jury the question of an acceptance.

It follows that the judgment appealed from should be reversed, and a new trial ordered, with costs to appellant in all courts to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, POUND and ANDREWS, JJ., concur.

Judgment reversed, etc.

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Statement of case.

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LOUIS ETTLINGER, Respondent, *v.* NATIONAL SURETY COMPANY, Appellant.

Counterclaim — when surety cannot interpose cause of action, existing in favor of his principal, as a defense or counter-claim.

A party when sued upon his obligation as surety cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff as a defense or counterclaim. The defense that the principal was induced to enter into a contract by fraud is only available to a surety when the principal repudiates the contract. (*Elliott v. Brady*, 192 N. Y. 221, followed.)

Ettlinger v. National Surety Co., 165 App. Div. 986, affirmed.

(Argued October 10, 1917; decided November 13, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 24, 1914, which affirmed a judgment in favor of plaintiff entered upon an order of the court at a Trial Term granting a motion by plaintiff for judgment on the pleadings.

The nature of the action and the facts, so far as material, are stated in the opinion.

Mortimer Hess, Henry L. Scheuerman and Theodore F. Kuper for appellant. The trial court erred in granting plaintiff's motion for judgment on the pleadings. The answer alleged fraud in the procuring of the bond or undertaking alleged in the complaint, which is a complete defense. (*Putnam v. Schuyler*, 4 Hun, 166; *Osborn v. Robbins*, 36 N. Y. 365; *Morehouse v. B. H. R. R. Co.*, 185 N. Y. 520.)

William W. Pellet for respondent. A party, when sued upon his obligation, cannot avail himself of an independent cause of action existing in favor of his

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principal against the plaintiff as a defense or counter-claim. (*Baird v. Mayor, etc.*, 96 N. Y. 567; *Gillespie v. Torrance*, 25 N. Y. 306; *American Guild v. Damon*, 186 N. Y. 360; *Elliott v. Brady*, 192 N. Y. 221; *Lasher v. Williamson*, 55 N. Y. 619; *Osborn v. Robbins*, 36 N. Y. 365; *Morehouse v. B. H. R. R. Co.*, 185 N. Y. 520.)

ANDREWS, J. The plaintiff brought an action in the City Court in New York against one Theodore Kruger. The latter desired to obtain a stay of the trial of that action. To obtain such result he stipulated in open court to give to the plaintiff a surety company bond providing that in the event of the ultimate affirmance and final determination of a certain other action between the same parties then on appeal, the amount involved in the action in which he desired a stay should be paid to the plaintiff, with costs. Thereafter he obtained a bond from the National Surety Company and the action was, in fact, stayed.

Subsequently the action on appeal was affirmed and finally determined in favor of the plaintiff. The defendant Kruger did not pay the amount involved in the action stayed and this action was brought against the surety company to enforce its bond.

The defense interposed is that the stipulation with regard to the stay was obtained from Kruger by the plaintiff through fraud; and the only question involved in this appeal is whether or not such defense is available to the surety.

In the past the answer to this question has not been altogether clear. (*Putnam v. Schuyler*, 4 Hun, 166; *Morse v. Hovey*, 9 Paige, 197; *Parshall v. Lamoreaux*, 37 Barb. 189; *Strong v. Grannis*, 26 Barb. 122; *Morehouse v. B. H. R. R. Co.*, 185 N. Y. 520; *Aeschlimann v. Presbyterian Hospital*, 165 N. Y. 296; *Osborn v. Robbins*, 36 N. Y. 365; *Whitcomb v. Shultz*, 223 Fed. Rep. 268;

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Patterson v. Gibson, 81 Ga. 802; *Griffith v. Sitgreaves*, 90 Pa. St. 161.)

It should be observed, however, that in some of the cases cited whatever is said on the subject is purely obiter. In others the defense interposed by the surety was duress practiced on the principal. These are not in point because they are based upon the proposition that the minds of the parties to the contract did not meet and that, therefore, there was no contract. If so, or if the alleged contract was void, clearly the surety would not be liable.

Many of the duress cases may also be distinguished on the theory that the surety was closely related to the principal. Such is the distinction taken in *Plummer v. People* (16 Ill. 358). There it was said that sureties upon a recognizance cannot plead the duress of the principal unless they bear some such relation to each other as father and son or husband and wife. In such cases the relations between the parties are so intimate that the constraint upon one is supposed to act with equal force upon the other. To the same effect is *Harris v. Carmody* (131 Mass. 51).

The rule that prevails in this state, however, is clearly laid down in *Elliott v. Brady* (192 N. Y. 221, 226). The opinion is by Judge CHASE and it was concurred in by all the court except Chief Judge CULLEN, who concurred in the result. "A party when sued upon his obligation cannot avail himself of an independent cause of action [here fraud inducing the contract] existing in favor of his principal against the plaintiff as a defense or counter-claim. It is for the principal to determine what use he will make thereof and the surety has no control over him in this respect."

A contract induced by fraud is not void. It is voidable at the option of the party defrauded and it requires affirmative action on his part to relieve him of the obli-

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gation. (*Baird v. Mayor, etc., of N. Y.*, 96 N. Y. 567.) If he elects to avoid the contract he can do so only on the condition of returning what he has received under it. If he elects not to avoid it he has an independent cause of action for damages arising from the fraud. (*Hazard v. Irwin*, 18 Pick. 95; *Henry v. Daley*, 17 Hun, 210.)

This cause of action belongs to him, not to the surety. The latter is not defrauded and cannot maintain an action for damages occasioned by the fraud. The surety could be allowed such damages as a defense or counter-claim only upon some principle that would make the recovery of them by him a bar to any future action or counterclaim by the principal. He might thus bar a large claim in favor of the latter by canceling a small one against himself.

"If the principal could abide by his contract, and the surety repudiate it, the strange result would be produced, that the principal would retain the fruits of the contract, whilst the surety would avoid the performance of his obligation, on the ground of its invalidity, in direct opposition to the acts of his principal, admitting that the contract was valid." (*Evans v. Keeland*, 9 Ala. 42.)

In other words, what shall be done with a contract induced by fraud is purely a question for the determination of the party on whom the fraud is committed. He may repudiate it, and if he does so the surety may avail himself of the repudiation, as was done in *Bennett v. Carey* (72 Iowa, 476). He may affirm it, in which case the surety cannot be heard to raise the question. He may suspend his action at least for a time and the surety may not compel him to elect. (*Henry v. Daley*, 17 Hun, 210; *Evans v. Keeland*, 9 Ala. 42; *Tucker v. State ex rel. Hart*, 72 Ind. 242; *Thompson v. Buckhannon*, 2 J. J. Marshall [Ky.], 416; *Oak v. Dustin*, 79 Me. 23; *Bowman v. Hiller*, 130 Mass. 153; *Robinson v. Gould*, 11 Cush. 55.)

Some of these cases are cases of duress, and, as we have

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said, such cases where it is held that the surety may plead the duress are not strictly in point. Where they reach the contrary conclusion, however, they are authority.

A distinction is sometimes made between cases where the surety is sued alone and those where he is sued together with his principal. But it is difficult to see how the fact that the principal is joined with the surety is material. If so, the rights of the parties depend upon the form of the action and the will of the plaintiff. For the latter cannot be compelled to bring in the principal as a defendant in an action brought by him to obtain a money judgment. (*Bauer v. Dewey*, 166 N. Y. 402.)

Of course if principal and surety are in fact sued and the principal sets up the defense that the contract should be set aside on the ground of fraud, the surety may undoubtedly avail himself of the same defense. If the principal succeeds there is nothing upon which to base the obligation of suretyship. But the principal may not choose to take any position. He may default in the action or he may ratify the contract and counterclaim for the damages caused by the fraud. In no event can he be deprived of his right to ratify the contract or deprived of his independent cause of action to recover damages for the fraud.

The judgment appealed from should be affirmed, with costs.

HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN and POUND, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment affirmed.

In the Matter of the Claim of JANE PLASS, Respondent,
v. THE CENTRAL NEW ENGLAND RAILWAY COMPANY,
Appellant.

STATE INDUSTRIAL COMMISSION, Respondent.

Workmen's Compensation Law — when industrial commission must determine nature of employment, whether pertaining to intrastate or interstate commerce.

Where an employee of a railroad company engaged in both intrastate and interstate commerce died from ivy poisoning contracted while working for the company, and there was some evidence tending to show that the deceased was engaged in work pertaining to interstate commerce, the state industrial commission should pass upon the evidence and determine the nature of such employment, and an award without any determination or finding relating thereto should be reversed and a new hearing ordered.

Matter of Plass v. Central N. E. Ry. Co., 169 App. Div. 826, reversed.

(Argued October 4, 1917; decided November 13, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 22, 1915, affirming an award of the state industrial commission made under the Workmen's Compensation Law.

The facts, so far as material, are stated in the opinion.

Edward R. Brumley for appellant. The deceased, Peter Plass, was engaged in interstate commerce while working for the Central New England Railway Company on or about August 8, 1914. (*Zitnik v. Union P. R. R. Co.*, 145 N. W. Rep. 344; *Hadwick v. Wabash R. R. Co.*, 168 S. W. Rep. 328; *L. & N. R. Co. v. Blankenship*, 74 So. Rep. 760; *Ambrecht v. D., L. & W. R. R. Co.*, 101 Atl. Rep. 203; *D. & R. G. R. R. Co. v. Wilson*, 163 Pac. Rep. 853; *Grybowski v. Erie R. R. Co.*, 95 Atl. Rep. 764; *G., H. & S. A. Ry. Co. v. Chojnacky*, 163 S. W. Rep. 1011; *Eng v. South. Pac. Co.*, 210 Fed. Rep. 92;

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Southern Ry. Co. v. Gunn, 240 Fed. Rep. 649; *L. & N. Ry. Co. v. Netherton*, 193 S. W. Rep. 1035.) If deceased was engaged in interstate commerce at the time, the sole and exclusive remedy is under the Federal Employers' Liability Act. (*Winfield v. N. Y. C. R. R. Co.*, 244 U. S. 147.)

Merton E. Lewis, Attorney-General (E. C. Aiken of counsel), for State Industrial Commission, respondent. The claimant's intestate was not engaged in interstate commerce. (*I. C. R. R. Co. v. Behrens*, 223 U. S. 476; *M. & S. L. R. R. Co. v. Winters*, 242 U. S. 353; *B. & O. R. R. Co. v. Branson*, 242 U. S. 623; *M. & S. L. R. R. Co. v. Nash*, 242 U. S. 619; *N. Y. C. & H. R. R. R. Co. v. White*, 243 U. S. 188; *C., B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177; *I. C. R. R. Co. v. Cousins*, 241 U. S. 641; *L. V. R. R. Co. v. Barlow*, 244 U. S. 183; *Kelly v. Penn. R. R. Co.*, 238 Fed. Rep. 95; *G., H. & S. A. Ry. Co. v. Chojnacky*, 163 S. W. Rep. 1013.)

COLLIN, J. The findings of the state industrial commission, unanimously sustained by the Appellate Division, establish as facts: The Central New England Railway Company was a corporation engaged in both intrastate and interstate commerce. The husband of the claimant, while employed by it, in cutting grass and removing poison ivy and other weeds along the line of its railroad in New York state, contracted ivy poisoning which caused his death. Whether or not he in such work was securing the safety of the railroad, or was performing services which were connected with either interstate or intrastate commerce was not found.

If there was any evidence that the work contributed to the safety and integrity of the railroad, the work was connected with and a part of interstate commerce by the railroad. "Tracks and bridges are as indispensable to interstate commerce by railroads as are engines and

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cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair." (*Pedersen v. D., L. & W. R. R. Co.*, 229 U. S. 146, 151; *N. Y. Central R. R. Co. v. Winfield*, 244 U. S. 147.) If the deceased was engaged in services pertaining to and a part of interstate commerce, the claimant was not entitled to an award. (*N. Y. Central R. R. Co. v. Winfield*, 244 U. S. 147.)

A witness in behalf of the employer testified that the object of the work was the safety of the bridges of the railroad and of the adjoining property and to keep fires from spreading; if the grass and weeds caught fire it might destroy parts of the railroad, and the weeds and grass, not cut and removed, would to a certain extent destroy the track, would come upon the track and cause the engines to slip. This testimony could not be wholly disregarded by the commission. It constituted some evidence, demanding a determination, that the work of the deceased was or was not within interstate commerce. The employer by the evidence, objections, request to find and argument directed the attention of the commission to its claim that an award could not be made because the deceased was engaged in interstate commerce. It was necessary to a lawful hearing and award that the commission should pass, under the evidence, upon the nature of the employment in which the deceased received his injuries. (*Matter of Saxon v. Erie R. R. Co.*, 221 N. Y. 179.)

The order of the Appellate Division and the award of the commission should be reversed, and a new hearing ordered, with costs to abide event.

HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO, McLAUGHLIN and CRANE, JJ., concur.

Order reversed, etc.

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Statement of case.

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WILLIAM MCLEAN, Respondent, *v.* STUDEBAKER BROTHERS COMPANY OF NEW YORK, Appellant.

Negligence — workman injured by cause plainly visible — when he cannot recover on ground that defendant should have taken precautions to prevent accident.

A transom over the door of defendant's garage, hung from the ceiling by hinges, with a sliding bolt at each end by which it can be immovably closed, which hinges and bolts are plainly visible, is not in itself a dangerous appliance and creates no trap or pitfall, and where a window cleaner of long experience, who had cleaned this transom each week for a period of nine months, placed his ladder against the transom, for the purpose of cleaning it, while it was unfastened, and it swung inward, causing the ladder to so move that plaintiff fell and was injured, he cannot recover on the ground that it was the duty of the defendant to have securely fastened the transom before he began to wash it and that failure so to do constituted negligence. (*Hess v. Bernheimer & Schwartz Pilsener Brewing Co.*, 219 N. Y. 415, followed.)

McLean v. Studebaker Brothers Co., 168 App. Div. 897, reversed.

(Submitted November 1, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 30, 1915, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Clayton J. Heermance and *S. Michael Cohen* for appellant. The complaint should have been dismissed at the close of the plaintiff's case and the refusal to dismiss was error. The plaintiff failed completely to show actionable negligence. (*Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; *Birch v. City of New York*, 190 N. Y. 397; *Hickok v. Auburn L., H. & P. Co.*, 200 N. Y. 464; *Heskell v. Auburn L., H. & P. Co.*, 209 N. Y. 86; *Gumhouse v. Franckel*, 153 App. Div. 359; 211 N. Y. 567; *Callan v. Pugh*, 54 App. Div. 545; *Fanjoy v. Searles*,

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29 Cal. 250; *Larkin v. O'Neill*, 119 N. Y. 221; *Flanagan v. Atlantic Alcatraz Asphalt Co.*, 37 App. Div. 476; *Miller v. Woodhead*, 104 N. Y. 471; *McAlpin v. Powell*, 70 N. Y. 126; *Cowen v. Kirby*, 180 Mass. 504.)

William F. Purdy for respondent. The defendant's negligence was sufficiently shown by the evidence and the refusal of the learned trial court to dismiss the complaint was proper. (*Larmore v. C. P. Iron Co.*, 191 N. Y. 391; *Grill v. Gutfreund*, 65 Misc. Rep. 506; *Cheever v. Ocean S. S. Co.*, 26 Misc. Rep. 193; *Homer v. Everitt*, 16 J. & S. 300; *Stastney v. Second Ave. Ry. Co.*, 18 N. Y. Supp. 800; *Shearman & Redfield on Neg.* [5th ed.] 183; *Thompson on Neg.* [2d ed.] §§ 953, 985; *Newall v. Bartlett*, 114 N. Y. 399; *Fogarty v. Bogart*, 43 App. Div. 430; *Delaney v. P. R. R. Co.*, 78 Hun, 393; *Griffen v. Manice*, 166 N. Y. 188; *Swords v. Edgar*, 59 N. Y. 28; *Stinson v. Edgewater Saw Mills Co.*, 139 App. Div. 170; *John Spry Lumber Co. v. Dugan*, 80 Ill. App. 394.)

COLLIN, J. The plaintiff seeks to recover damages for personal injuries received, he alleges, by reason of the negligence of the defendant. The Appellate Division by a decision, not unanimous, affirmed the judgment consequent upon the verdict of the jury in favor of the plaintiff. At the close of the evidence the defendant excepted to the denial of its motion to dismiss the complaint. If there was no evidence that tended to support the verdict, the submission of the case to the jury was error. (*Heskell v. Auburn L., H. & P. Co.*, 209 N. Y. 86.)

The jury might have found as the facts most favorable to the plaintiff: In December, 1912, the time the plaintiff was injured, and through the several years last prior thereto, the plaintiff was the employee of L. Frankel & Company, whose business was window cleaning. The defendant was the proprietor of a garage, the windows

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of which L. Frankel & Company had contracted to clean. The plaintiff was at the garage engaged in performing the contract. A transom of the garage, against which was the top of the ladder in use by the plaintiff in washing it, swung in, causing the ladder to so move that plaintiff fell and was injured. The transom was above and contiguous to the entrance doors. The entrance was sixteen feet wide and twelve feet in height. The transom was of equal width and two feet in height. It hung, at its top, upon hinges so that it could be swung inwardly and up to the ceiling by means of a rope or chain, thus increasing by its height the height of the entrance, and was frequently so used. At its either end was a sliding bolt by means of which it could be immovably closed. The hinges and bolts were plainly visible. The plaintiff had been a window cleaner, employed as stated, for about thirteen years. Each Tuesday of the nine months last preceding the accident, he had cleaned the windows, including the transom, of the garage. The construction and use of the transom had not been changed through at least the last two months of that period. The plaintiff had never seen the transom open, and had always, when washing it, found it solid or secure. The plaintiff testified that he had noticed when cleaning it on previous occasions that it had no hinges or catches and was not made to open and shut, but the testimony of a disinterested witness in behalf of the plaintiff was that through the two months, as stated, it had hinges upon which it swung. The method adopted by the plaintiff in washing the transom was known to the defendant.

The plaintiff asserts it was the duty of the defendant to have securely fastened the transom before the plaintiff began to wash it, and failure so to do constituted its negligence. The duty did not exist. The duty of the defendant to the plaintiff, under the conditions here

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existing, was the duty owed by it to its own employee in the same case. (*Hess v. Bernheimer & Schwartz Pilsener Brewing Co.*, 219 N. Y. 415.) The measure of it was reasonable care and prudence in securing the safety of the plaintiff.

The case here does not involve the sufficiency or integrity of any appliance or instrumentality. The transom in and of itself and in the manner of its affixation was suitable and proper. It in all respects was adapted and appropriate to its use. It was lawful for the defendant to so use it and to construct it for the use. When the plaintiff came to the garage, the transom in all its parts was readily discernible. Within or connected with or a part of it, there was not any latent defect or hidden danger. It did not create a trap or pitfall. Ordinary and reasonably prudent observation by the plaintiff would have disclosed to him the full and exact situation and condition, the hinges, the bolts, the chain or rope by which the transom was swung to the ceiling and the unfastened and movable condition of the transom. Through ordinary intelligence, experience and thoughtfulness, he would have known that the ladder against it, ascended by him, might cause it to swing and the stability of the ladder and his safety affected. By using the sliding bolts, he could, as well as could the defendant, have made it stable and secured his safety. The defendant was not bound to accompany him, through the agency of an officer or employee, to the transom and slide the bolts or warn him that the ladder against it might cause it to swing, because no duty rests on a master to secure the safety of his servant against a condition, or even defects, risks or dangers that may be readily observed by the reasonable use of the senses, having in view the age, intelligence and experience of the servant. The plaintiff here was experienced and intelligent. His means of knowing the danger were the

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same as the defendant's. The risks and danger were obvious and comprehensible through ordinary and reasonable care and inspection, and it was not the duty of the defendant to save him from them. (*McCafferty v. Lewando's F. Dyeing & Cleansing Co.*, 194 Mass. 412; *Flood v. Western Union Tel. Co.*, 131 N. Y. 603; *Stuart v. West End Street Railway Co.*, 163 Mass. 391; *Mississippi River Logging Co. v. Schneider*, 74 Fed. Rep. 195.)

The judgment should be reversed and a new trial granted, costs to abide the event.

HISCOCK, Ch. J., CUDDEBACK, HOGAN, POUND and ANDREWS, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

**THE PEOPLE OF THE STATE OF NEW YORK ex rel.
SAMUEL FLOERSHEIMER, Appellant, v. LAWSON PURDY
et al., as Commissioners of Taxes and Assessments of
the City of New York, Respondents.**

Tax—when certiorari to review assessment obtained for taxpayer by a corporation should not be dismissed on ground that the corporation was prohibited from practicing law.

Where a taxpayer acting in good faith employed a corporation to take the necessary steps to have an assessment against him corrected and the corporation employed an attorney who obtained a writ of certiorari to review the assessment, the writ should not be dismissed upon the ground that the corporation was prohibited from practicing law by the statutes (Business Corp. Law, § 2-a; Cons. Laws, ch. 4, and Penal Law, § 280), the taxpayer having thereafter ratified the employment of and formally retained the attorney in the matter.

People ex rel. Floersheimer v. Purdy, 174 App. Div. 694, reversed.

(Argued April 18, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 1, 1916, which reversed an order of Special Term denying a motion to vacate an order granting a writ of certiorari to review the action of the defendants in assessing real property of the relator for purposes of taxation for the year 1914, and granted said motion. The motion to vacate the writ was made upon the grounds that the order directing the issuance of the writ was granted upon the motion of one Gabriel I. Lewis, representing himself as attorney for the relator, whereas

he was not acting as attorney for the relator, but for a corporation known as L. Tanenbaum, Strauss & Company, Inc., which was a stranger to the subject-matter of the proceeding; that the proceeding was commenced and the said writ was obtained in violation of the provisions of section 280 of the Penal Law and section 2-a of the Business Corporations Law; that the application filed with the commissioners of taxes was filed by L. Tanenbaum, Strauss & Company, Inc., and that that act constituted a violation of section 280 of the Penal Law and of section 2-a of the Business Corporations Law; that Gabriel I. Lewis, when applying for said writ, unlawfully represented himself as attorney for the relator; that the writ was unlawfully obtained and inadvisedly granted, and that the court was without jurisdiction in the premises, and that no application was presented to the commissioners of taxes and assessments by the owner of the property affected, nor by any duly authorized agent of the owner, who had knowledge of the facts.

Charles A. Boston and Lindley M. Garrison for appellant.

Lamar Hardy, Corporation Counsel (William H. King and Eugene Fay of counsel), for respondents.

Julius Henry Cohen, Edwin M. Ottenbourg and George R. Adams for New York County Lawyers' Association.

Per Curiam. We think the order of the Appellate Division vacating the order granting the writ of certiorari and dismissing the writ erroneous. Assuming without deciding that the act of L. Tannenbaum, Strauss & Co., Inc., in instituting the proceeding which resulted in the issuance of the writ was in violation of section 2-a of the Business Corporation Law (Cons. Laws, ch. 4) and section 280 of the Penal Law, and that the act of the attorney who made the motion which resulted in the issuance of the writ of certiorari was unauthorized, such acts in view

of the other undisputed facts were no reason why the relator should be deprived of his right to review the assessment. He was about to depart for Europe and believing that his property had been illegally assessed, left the matter with L. Tannenbaum, Strauss & Co., Inc., to take such lawful steps as it might deem advisable to have the assessment corrected. There is nothing in the record to indicate that he did not act in the utmost good faith in employing such corporation or that he had any reason to believe that it was not authorized to do such acts as might be necessary for that purpose. It is true that he did not employ the attorney who subsequently made the application for the writ of certiorari, but after his return from Europe, the writ in the meantime having been issued, he ratified such employment and formally retained him in the matter. Under such circumstances it would be unjust to hold that because the corporation was unauthorized to act in the first instance, or the attorney was unauthorized to procure the issuance of the writ, the relator should be punished by denying him any relief whatever.

The order appealed from should, therefore, be reversed, with costs to the appellant in the Appellate Division and this court, and the order of the Special Term affirmed.

HISCOCK, Ch. J., CARDODO, POUND, McLAUGHLIN and ANDREWS, JJ., concur; CHASE and HOGAN, JJ., dissent.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
SAMUEL FLOERSHEIMER, Appellant, v. LAWSON PURDY
et al., as Commissioners of Taxes and Assessments of
the City of New York, Respondents.

People ex rel. Floersheimer v. Purdy, 174 App. Div. 694, reversed.
(Argued April 18, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 1, 1916, which reversed an order of Special

Term denying a motion to vacate an order granting a writ of certiorari to review the action of the defendants in assessing real property of the relator for purposes of taxation for the year 1915 and granted said motion.

Charles A. Boston for appellant.

Lamar Hardy, Corporation Counsel (William H. King and Eugene Fay of counsel), for respondent.

Per Curiam. On authority of 1914 proceeding, herewith decided, the order of the Appellate Division appealed from in this proceeding should be reversed, with costs to appellant in the Appellate Division and in this court, and the order of the Special Term affirmed.

HISCOCK, Ch. J., CARDODO, POUND, McLAUGHLIN and ANDREWS, JJ., concur; CHASE and HOGAN, JJ., concur in result.

Order reversed, etc.

JOSEPH DEGNAN, Appellant, *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH, SCOTLAND, Respondent.

Degnan v. General Acc., F. & L. Assur. Corp., Ltd., 161 App. Div. 439, affirmed.

(Argued April 27, 1917; decided May 8, 1917.)

APPEAL from a judgment entered June 13, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action by an insurance broker to recover commissions. Plaintiff brought two applications for accident liability insurance to defendant's general agents who stated that his compensation would be twenty five per cent of the earned premiums. After the policies had been in force some months the policies, at the request of the insured, were canceled and new policies issued. The plaintiff had received his commis-

sion upon the policy issued to the contracting company to the date of cancellation, and brings this action to recover commissions alleged to have accrued after the cancellation.

Lemuel E. Quigg for appellant.

Stephen P. Anderton for respondent.

Per Curiam. In holding that the complaint was properly dismissed by the Appellate Division, we confine our decision to the action now before us. We leave open the question whether the plaintiff may recover his commissions on the basis of the short rate premium which the defendant failed to exact in canceling the policies. That is not the theory either of the complaint or of the trial. The complaint was framed and the action tried upon the theory that the cancellation was ineffective and that the policies remained in force.

The judgment should be affirmed with costs.

HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO, CRANE and ANDREWS, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. ELIAS JAZRA, Appellant.

(Argued April 4, 1917; decided May 8, 1917.)

APPEAL from a judgment of the Court of General Sessions of the Peace in the county of New York rendered July 6, 1916, upon a verdict convicting the defendant of the crime of murder in the first degree.

Millard H. Ellison and *James A. Foley* for appellant.

Edward Swann, District Attorney (*Robert C. Taylor* of counsel) for respondent.

Judgment of conviction affirmed; no opinion.

Concur: CHASE, COLLIN, HOGAN, CARDENZO, POUND, CRANE and ANDREWS, JJ.

In the Matter of the Accounting of SARAH E. HALLOCK et al., as Executors of STEPHEN HALLOCK, Deceased, Appellants.

KATE T. HOLMES et al., Respondents.

Matter of Hallock, 177 App. Div. 948, affirmed.

(Argued April 18, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 14, 1917, which affirmed a decree of the Orleans County Surrogate's Court settling the accounts of the executors of Stephen Hallock, deceased. The decree rejected the contention of the executors that they were entitled to a final discharge as executors, rejected their contention that they were entitled to full commissions as executors for receiving and paying out the entire estate, and rejected their contention that the decree should authorize and direct them to retain the residuary estate as testamentary trustees.

Isaac S. Signor and Charles G. Signor for appellants.

B. E. Harcourt for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDODOZ, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Probate of the Will of PETER CAFFREY, Deceased.

NORAH NOONAN et al., Appellants; MATTHEW J. O'BRIEN, Individually and as Executor of ANNIE O'NEILL, Deceased, Respondent.

Matter of Caffrey, 174 App. Div. 398, affirmed.

(Argued April 18, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 3, 1916, which affirmed a decree of the

New York County Surrogate's Court admitting to probate the will of Peter Caffrey, deceased, entered upon a verdict directed by the court. The only claim now made by contestants is that the propounded paper was never executed by Peter Caffrey, the decedent; that the signature or mark affixed to the will was not genuine, but a forgery.

Winifred Sullivan for appellants.

Randolph Harris and *Charles P. Howland* for respondent.

Order affirmed, with costs; no opinion.

Concur: *HISCOCK*, Ch. J., *CHASE*, *HOGAN*, *CARDOZO*, *POUND* and *ANDREWS*, JJ. Not sitting: *McLAUGHLIN*, J.

JACOB DAVIDSON et al., Copartners Doing Business as DAVIDSON BROS., Appellants, v. THE CITY OF NEW YORK, Respondent.

Davidson v. City of New York, 175 App. Div. 969, affirmed.
(Submitted April 18, 1917; decided May 8, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 8, 1916, which affirmed an order of Special Term granting a motion to vacate an order for the examination of the defendant before trial. The following question was certified: "Do the provisions of sections 872 and 873 of the Code of Civil Procedure apply to a municipal corporation as a party to an action?"

Gustavus A. Rogers and *Saul E. Rogers* for appellants.

Lamar Hardy, Corporation Counsel (*Terence Farley* and *Charles J. Nehrbas* of counsel), for respondent.

Order affirmed, with costs, and question certified answered in the negative; no opinion.

Concur: *HISCOCK*, Ch. J., *CHASE*, *HOGAN*, *CARDOZO*, *POUND*, *McLAUGHLIN* and *ANDREWS*, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
BROADWAY PARK PLACE COMPANY, Appellant, v. LAW-
SON PURDY et al., as Commissioners of Taxes and
Assessments of the City of New York, Respondents.

People ex rel. Broadway Park Place Co. v. Purdy, 175 App. Div. 926, affirmed.

(Argued April 18, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 10, 1916, which affirmed an order of Special Term quashing a writ of certiorari. The proceeding was instituted to review an assessment on real property. The defendants moved at Special Term to quash the writ of certiorari on the grounds: That under section 21a of chapter 62 of the Laws of 1909 (Chapter 60 of the Consolidated Laws), added by chapter 117 of the Laws of 1911, the total assessment of the land with the buildings thereon only can be reviewed; that the said writ of certiorari herein directs a review solely of the assessed value of the land exclusive of the buildings thereon; that the petition upon which the said writ of certiorari was issued contains no allegation showing the total assessment of the land with the buildings thereon to be erroneous by reason of overvaluation or inequality; that the petition upon which the said writ of certiorari was issued is not in accordance with the procedure provided by article 13 of chapter 62 of the Laws of 1909 (Chapter 60 of the Consolidated Laws) and is not authorized by said chapter 62 of the Laws of 1909, in that said petition does not allege facts sufficient to show the relator to be entitled to any relief from the assessment complained of in the petition herein, by reason of illegality, overvaluation or inequality; that the said petition is not authorized by any other law or rule of court; that the said writ was inadvisedly granted; that the court was without jurisdiction in the premises.

Paul Armitage and Charles E. F. McCann for appellant.

Lamar Hardy, Corporation Counsel (William H. King and Eugene Fay of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDODOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

**In the Matter of the Estate of CATHERINE M. LOCKWOOD,
an Incompetent Person.**

RAYMOND D. FULLER, Appellant; **WILLIAM P. LOCKWOOD et al.**, as Administrators of **CATHERINE M. LOCKWOOD, Deceased**, Respondents.

Matter of Lockwood, 172 App. Div. 983, affirmed.
(Submitted April 19, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 5, 1916, which affirmed an order of Special Term settling and surcharging the accounts of the appellant herein as committee of the estate of Catherine M. Lockwood, an incompetent person, since deceased. The questions were as to the amount of interest with which the appellant should be charged, and the compensation to which he was entitled in the form of commissions and the additional allowances for his services as committee.

Harry A. De Coster and Albert M. Mills for appellant.

Myron G. Bronner for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDODOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of THE MERCHANTS BANK OF BROOKLYN,
Appellant, v. PHILIP F. MILLER, Respondent.

Matter of Merchants Bank of Brooklyn v. Miller, 176 App. Div. 412, affirmed.

(Argued April 19, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 19, 1917, which affirmed an order of Special Term canceling of record and discharging a judgment recovered in the Supreme Court against the respondent in favor of the appellant for the sum of \$3,237.14 on the 17th day of February, 1900, and docketed the same day in the office of the clerk of the county of Kings. The application to cancel the judgment was based upon the ground that the judgment debtor respondent had been, subsequent to the recovery of the judgment, duly adjudicated and discharged in bankruptcy from all his debts. The motion was opposed upon the grounds that the bankruptcy schedules contained neither the address of the appellant judgment creditor nor a statement that the address was unknown, and that there was nothing among the records of the appellant in the possession of the superintendent of banks to show that the appellant had received any notice of the bankruptcy proceedings.

Joseph G. Deane for appellant.

Louis J. Halbert for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Claim of MAUDE J. SLOATE et al., Respondents, against ROCHESTER TAXICAB COMPANY et al., Appellants.

Matter of Sloate v. Rochester Taxicab Co., 177 App. Div. 57, affirmed.

(Argued April 19, 1917; decided May 8, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 16, 1917, which affirmed an award of the state industrial commission under the Workmen's Compensation Act. The husband and father of claimants was employed as a taxicab driver and was killed in the course of his employment. Besides his regular pay he also averaged in tips eighty-five cents a day, or five dollars and ten cents a week. The tips were paid to him by persons using the taxicab service. The receiving of these tips was known to his employer and was acquiesced in by him. The industrial commission found that from the nature of the case the average weekly wages would be determined fairly and reasonably only by taking the full actual earnings of deceased and all other employees working in the same employment in the same locality during one full year of work. The contention of the appellants is that the tips received cannot be considered as part of the wages of the deceased.

William Butler for appellants.

Egburt E. Woodbury, Attorney-General (E. C. Aiken of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDZOZO, POUND, McLAUGHLIN and ANDREWS, JJ. Not voting: HOGAN, J.

In the Matter of the Claim of JACOB HELLMAN, Respondent, against MANNING SAND PAPER COMPANY et al., Appellants.

Matter of Hellman v. Manning Sand Paper Co., 176 App. Div. 127, affirmed.

(Argued April 19, 1917; decided May 8, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 17, 1917, affirming an award of the state industrial commission made under the Workmen's Compensation Law. The complainant was injured while in the employ of the Manning Sand Paper Company as a night watchman. While standing on the platform of the employer's factory two men came along and assaulted him, one taking some money from his pocket, the other stealing his lunch box. During the assault he was thrown down the stairs leading from the platform to the ground, receiving bruises and an injury to the left shoulder. Appellant's contentions were that the plant was not in operation, the claimant was not engaged in a hazardous employment at the time of the accident, and the claim, therefore, does not come within the provisions of the act; that the assault committed upon the claimant was not due to any special risk connected with his employment, and the injuries, therefore, did not arise out of the employment, and that the award was not based solely upon the injuries incident to the assault, but was also based upon disability arising from a prior accident.

Jeremiah F. Connor for appellants.

Egburt E. Woodbury, Attorney-General (E. C. Aiken of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Claim of HARRY L. MARKELL,
Respondent, against DANIEL GREEN FELT SHOE COMPANY et al., Appellants.

Matter of Markell v. Green Felt Shoe Co., 175 App. Div. 958,
affirmed.

(Argued April 19, 1917; decided May 8, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1916, affirming an award of the state industrial commission made under the Workmen's Compensation Act. Claimant while employed as foreman for the defendant felt company and in the discharge of his duties received injuries resulting in the loss of an eye through the act of an employee of a machinery company who had been repairing machines in defendant's plant and who, approaching claimant in a dark room, placed his arms about claimant's neck and drew his head forward onto a lead pencil in his pocket in such manner that the lead penetrated the eyeball. Appellants contended that the injury did not arise out of the employment for the reasons that it was not received as a natural incident of the work and was not due to a risk connected with the employment; that it was due to a risk to which the claimant was exposed in common with any other person; that the act causing the injury was in effect skylarking or horse-play, and was outside the scope of employment of the machine company's employee.

Jeremiah F. Connor for appellants.

*Egburt E. Woodbury, Attorney-General (E. C. Aiken
of counsel), for state industrial commission.*

George W. Ward for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO,
POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Petition of HERBERT E. SISSON, as State Commissioner of Excise, Respondent, for Revocation of Liquor Tax Certificate Issued to WLADYSLAW WISNIEWSKI, Appellant.

Matter of Sisson (Wisniewski), 177 App. Div. 947, affirmed.
(Argued April 20, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 14, 1917, which reversed an order of Special Term dismissing a petition for the revocation of a liquor tax certificate and granted the application. The proceeding was commenced to revoke the certificate on the ground that material false statements were made in the application for the certificate concerning consents of dwelling owners within the 300 feet prohibited distance. A sufficient number of consents of dwelling owners as required by the Liquor Tax Law were on file at the time of the issuing of the certificate but they were filed at two different times and were not all filed simultaneously with the issuing of a liquor tax certificate. The questions were whether the consents filed at two different times but which remained on file unrevoked were sufficient, and if not whether petitioner was not estopped from raising that question by reason of the fact that the same were accepted as valid and legal consents and duly acted on by the transfer and issuing of the liquor tax certificate by the certificate-issuing officer with full knowledge of the facts.

Walter Welch for appellant.

H. B. Chase and Harry D. Sanders for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDZOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

JAMES L. BUNNELL, Appellant, v. ELVERTON R. CHAPMAN, Respondent.

Bunnell v. Chapman, 175 App. Div. 855, affirmed.

(Argued April 20, 1917; decided May 8, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 29, 1916, which reversed an order of Special Term overruling a demurrer to the complaint and sustained such demurrer in an action to recover broker's commissions alleged to have been earned under an employment to obtain for defendant a purchaser for cartridges. It was alleged that plaintiff procured a purchaser, that he was accepted by the defendant and a formal contract in writing was entered into between the said purchaser and defendant. It was further alleged that payment of commissions was to be made as the goods sold were delivered and paid for, but that defendant repudiated and abandoned the contract by refusing to perform an obligation incumbent upon him thereunder to furnish security for performance. The defense was that this obligation on the part of defendant, a breach of which was alleged, was conditioned upon the purchaser first causing to be transferred to a New York bank the sum of \$100,000 on or before noon August 3, 1915, "to guarantee the transfer of the balance and assure final contract," and within fifteen days after the date of the contract "to cause to be established in a New York bank a banker's confirmed credit," and that performance of those conditions by the purchaser was not alleged. The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

Alton B. Parker and Eugene Frayer for appellant.

Leon O. Bailey and Huntington W. Merchant for respondent.

Order affirmed, with costs, and question certified answered in the negative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOWZO and ANDREWS, JJ. Not sitting: POUND and McLAUGHLIN, JJ.

In the Matter of the Claim of BESSIE PEAKE et al., Respondents, v. FRED W. LAKIN et al., Appellants.

Matter of Peake v. Lakin, 176 App. Div. 917, affirmed.
(Submitted April 23, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 17, 1917, affirming an award of the state industrial commission under the Workmen's Compensation Law. The husband and father of claimants was killed while engaged as a lumberman through the falling of a tree. It appeared that defendant Lakin had entered into a contract with one Mallory to peel and load on cars certain bark. Mallory testified that he had procured the deceased and another man to assist him and that "We (three men) were working under a partnership agreement and there was no boss, each doing his share of the work." The question was whether the deceased was in the employ of Lakin.

Joseph F. Murray and *Robert M. McCormack* for appellants.

Egburt E. Woodbury, Attorney-General (*E. C. Aiken* of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOWZO, CRANE and ANDREWS, JJ. Not voting: McLAUGHLIN, J.

In the Matter of the Application of ALEXANDER MICHAELSON, Appellant, for Revocation of an Order of Disbarment and for Reinstatement as an Attorney.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Respondent.

Matter of Michaelson, 174 App. Div. 909, appeal dismissed.
(Argued April 28, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 10, 1916, which denied a motion for an order revoking a prior order disbarring the petitioner from practice as an attorney and counselor at law.

Huntington W. Merchant for appellant.

Einar Chrystie for respondent.

Appeal dismissed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDODOZ, CRANE and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ANNIE G. SHUFFLE, Respondent, *v.* THE TOWN OF RHINEBECK et al., Appellants.

People ex rel. Shuffle v. Town of Rhinebeck, 175 App. Div. 951, affirmed.

(Argued April 24, 1917; decided May 8, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 24, 1916, which modified and affirmed as modified an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant Town of Rhinebeck to condemn the relator's rights of passage, private easement and right of way on and over that portion of Schatzel street at Rhinecliff, N. Y., lead-

ing from relator's premises on, over and across the railroad tracks and right of way of said New York Central and Hudson River Railroad Company to the dock, wharf and lands of the Rhinebeck and Kingston Ferry Company situated westerly of said railroad tracks and right of way contiguous thereto. Plaintiff claims to be the owner of certain private easements and rights of access and egress over the Schatzel avenue grade crossing at Rhinecliff, which has been eliminated pursuant to proceedings before the public service commission for the second district, and that such private rights are distinct from the rights of the public, and that the municipal authorities should be compelled to acquire such rights; that such rights exist either as riparian rights or by virtue of the provisions of the charter of the Hudson River Railroad Company or as a result of the filing of a map by the plaintiff's predecessor in title. The defendants deny that any property rights of the plaintiff have been taken, destroyed or injured by the elimination of the grade crossing.

John E. Mack for Town of Rhinebeck, appellant.

Robert Wilkinson for New York Central Railroad Company, appellant.

MacDonald De Witt for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO, McLAUGHLIN, CRANE and ANDREWS, JJ.

GEORGE H. SMITH et al., Respondents, v. CORDEN T. GRAHAM, Appellant.

(Submitted April 30, 1917; decided May 8, 1917.)

MOTION for re-argument. (See 217 N. Y. 655.)

Motion granted, the re-argument to be limited to the question whether the judgment should be modified by pro-

viding in substance that nothing therein contained shall prohibit the defendant from removing the addition from the lands described in the deed of May 2, 1905, and erecting or remodeling the addition so as to make it a dwelling as defined in the deed of August 9, 1899.

**BARCALO MANUFACTURING COMPANY, Respondent, v.
MALDONADO & COMPANY, Appellant.**

Barcalo Manfg. Co. v. Maldonado & Co., 168 App. Div. 929, modified.

(Submitted May 4, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 9, 1914, affirming a judgment in favor of plaintiff, entered upon the report of a referee in an action to recover a balance due for goods sold and delivered and to recover money had and received by defendant to the use of the plaintiff. The answer does not deny the receipt of the amount claimed to the use of the plaintiff, but it does deny that by reason of the receipt it became indebted in any sum and alleges that the amount was applied to the use and purposes set forth in the counter-claim for freight, storage, cartage and insurance alleged to have been expended by the defendant in connection with three lots of merchandise consigned by the plaintiff from Buffalo to the defendant in San Francisco in the summer of 1906.

Maurice C. Spratt, Alfred L. Becker and James J. Franc for appellant.

August Becker for respondent.

Per Curiam. The referee has made inconsistent findings. He has found that \$910.36 represents the plaintiff's net invoice value of the goods sold from the first consignment and has credited the plaintiff with that amount.

By defendant's ninth request to find, he determined the amount to be \$773.60. The defendant, appellant, is entitled to this difference of \$136.76, with interest thereon from August 8, 1907, to May 5, 1913, which is \$47.18, making a total of \$183.94. (*Hazard v. Wight*, 201 N. Y. 399; *Whalen v. Stuart*, 194 N. Y. 495, 502.)

The judgment should be modified by deducting the sum of \$183.94, and as so modified affirmed, without costs.

HISCOCK, Ch. J., COLLIN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ. concur.

Judgment accordingly.

KINGS COUNTY LIGHTING COMPANY, Respondent, *v.* CITY OF NEW YORK, Appellant.

Kings County Lighting Co. v. City of New York, 176 App. Div. 175, affirmed.

(Argued April 25, 1917; decided May 15, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 30, 1916, which affirmed an order of Special Term sustaining demurrers to separate defenses set up in the answer. The action is to recover for gas furnished the city for street lighting and for use in public buildings in the thirtieth ward of the borough of Brooklyn, formerly the town of New Utrecht, under a contract theretofore entered into with the authorities of said town. The answer set up as a separate defense that by an act of the legislature, which became a law on June 3, 1905, which is known as chapter 736 of the Laws of 1905, the legislature of the state fixed the price of illuminating gas to be furnished and sold by the plaintiff to the city on and after July 1, 1905, at a sum not to exceed seventy-five cents per 1,000 cubic feet of gas, and that the price demanded by the plaintiff for the gas supplied to the city is in excess of that fixed by

the said act; alleged the same facts for a partial defense, and for a third and partial defense alleged the enactment of chapter 736 of the Laws of 1905, fixing the price of gas at seventy-five cents per 1,000 cubic feet, and further alleged that the said price of seventy-five cents per 1,000 cubic feet is the reasonable value of the gas furnished to the city, and that the price for gas which the city is required to pay under the alleged contract is more than the reasonable value of such gas.

The following questions were certified: "1. Is the first separate defense contained in the answer of defendant to plaintiff's first cause of action insufficient in law upon the face thereof? 2. Is the second separate and partial defense contained in the answer of the defendant to plaintiff's first cause of action insufficient in law upon the face thereof? 3. Is the third separate and partial defense contained in the answer of the defendant to plaintiff's first cause of action insufficient in law upon the face thereof?"

Lamar Hardy, Corporation Counsel (Samuel J. Rosensohn, Felix Frankfurter and Walter E. Meyer of counsel), for appellant.

Samuel F. Moran for respondent.

Order affirmed, with costs, and questions certified answered in the affirmative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDZOZO, McLAUGHLIN and ANDREWS, JJ. Not sitting: CRANE, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. WILLIAM McNAMARA, Appellant.

(Argued April 26, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Supreme Court, rendered June 7, 1916, at a Trial Term for the county of

Westchester, upon a verdict convicting the defendant of the crime of murder in the first degree.

James F. Dalton for appellant.

Lee Parsons Davis, District Attorney (*Thomas A. McKennell* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO, McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. Morris Solomon and Jules Cahn, Appellants.

People v. Solomon, 174 App. Div. 144, affirmed.

(Argued April 26, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 6, 1916, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendants of the crime of bookmaking in violation of section 986 of the Penal Law.

William Wills for appellants.

Denis O'Leary, District Attorney (*William J. Morris, Jr.*, and *Theodore J. Groh* of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO, McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. Joseph Tortora et al., Appellants.

People v. Tortora, 176 App. Div. 980, affirmed.

(Argued April 26, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department,

entered January 5, 1917, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendants of the crime of bookmaking in violation of section 986 of the Penal Law.

William Wills for appellants.

Denis O'Leary, District Attorney (William J. Morris Jr., and Theodore J. Groh of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDODOZI,
McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES S. WALTON, Appellant, v. HORACE M. HICKS, Respondent.

People ex rel. Walton v. Hicks, 178 App. Div. 888, affirmed.
(Argued April 26, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered September 20, 1916, affirming a judgment in favor of defendant entered upon a decision of the court at a Trial Term without a jury in an action in the nature of quo warranto to test title to the office of health officer of the city of Amsterdam. The relator was appointed health officer of the city of Amsterdam, without having passed the required civil service examination and took the oath of office. Thereafter he took and passed the required examination and was again appointed health officer, but failed within fifteen days to take a new oath of office. He entered upon the performance of his duties, however, and continued in occupation of the office until at a subsequent meeting of the board of health he was ousted and the defendant regularly appointed in his place. The question was whether relator's failure to take the oath of office within fifteen days after his last appointment vitiated the appointment and vacated the office.

*Egburt E. Woodbury, Attorney-General (J. H. Dealy
of counsel), for appellant.*

Ambrose P. Fitz-James for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDZOZO,
McLAUGHLIN, CRANE and ANDREWS, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK ex rel. LOUIS
J. CHESNER, Respondent, v. J. EDWARD MALONEY,
Appellant.**

People ex rel. Chesner v. Maloney, 175 App. Div. 914, affirmed.
(Submitted April 26, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 24, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action in the nature of quo warranto to determine title to the office of commissioner of elections for the county of Cattaraugus. Prior to 1914 the relator had for two years held the office of commissioner of elections and in that year was redesignated by the chairman of the Democratic county committee to continue in office. The board of supervisors, however, ignoring the designation, appointed the defendant to succeed the relator. The relator claimed that the appointment was illegal and that he held over.

John J. Inman and W. K. Harrison for appellant.

*Egburt E. Woodbury, Attorney-General (Patrick S.
Collins of counsel), for respondent.*

Judgment affirmed, with costs; no opinion.

Concur: CHASE, CARDZOZO, CRANE and ANDREWS, JJ.
Dissenting: HISCOCK, Ch. J., HOGAN and McLAUGHLIN,
JJ.

**THE NORTHERN BANK OF NEW YORK et al., Appellants,
v. WASHINGTON SAVINGS BANK, Respondent.**

Northern Bank of N. Y. v. Washington Savings Bank, 172 App. Div. 341, affirmed.

(Submitted April 26, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 1, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. This controversy affects the ownership of twenty-seven bonds and mortgages or the proceeds of their collection. In December, 1910, when the superintendent of banks took possession of the plaintiffs and the defendant, these bonds and mortgages with minor exceptions were found in the possession of the plaintiff, Northern Bank of New York. The record title to these bonds and mortgages, however, was in the defendant, Washington Savings Bank, from whose possession they had been removed. The record title was vested in the Washington Savings Bank by virtue of four separate assignments covering respectively fourteen mortgages, one mortgage, eight mortgages and four mortgages. This action was commenced by the plaintiffs to declare these assignments invalid and a cloud upon the title of the plaintiffs. The defendant counterclaimed for the possession of the bonds and mortgages and an adjudication that it was the proper owner. Decision was rendered against the plaintiff dismissing the complaint upon the merits and in favor of the defendant sustaining the counterclaim.

Henry H. Abbott, George W. Morgan and Edward A. Craighill, Jr., for appellants.

Samuel S. Koenig, Oliver L. Goldsmith and Milton M. Sittenfield for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CRANE and ANDREWS, JJ. Not sitting: CARDOZO and McLAUGHLIN, JJ.

WILLIAM T. EMMET, as Superintendent of Insurance of the State of New York, Respondent, v. NORTHERN BANK OF NEW YORK, Appellant.

Emmet v. Northern Bank of New York, 173 App. Div. 840, affirmed.

(Submitted April 26, 1917; decided May 15, 1917.)

APPEAL from a judgment entered October 14, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of defendant entered upon a decision of the court on trial at Special Term, and directing a judgment in favor of plaintiff in an action to procure the cancellation of a promissory note executed in the name of the Title and Guarantee Company of Rochester by two of its executive officers. Plaintiff demanded that this note be surrendered and canceled for the reasons: That it was executed without authority of the Title and Guarantee Company; that it was executed as the result of a fraudulent conspiracy to which defendant was a party, for the purpose of raising funds to pay an antecedent indebtedness of the Bankers Realty and Security Company to defendant; that the plaintiff received no consideration for such note. Defendant contended: That the note was validly issued; that not only did plaintiff receive consideration for the note, but that such consideration was transferred from plaintiff into the pockets of plaintiff's sole stockholder, the Aetna Indemnity Company, a Connecticut corporation, and was used by the indemnity company to reduce its liabilities *pro tanto* in the Northern Bank, and that defendant should have judgment for the amount of the note. At Special Term the court rendered a decision for the defendant, upon which judgment was entered dismissing the complaint and awarding to defendant on its counterclaim the sum of \$50,000, the amount of the note, with interest and costs. The Appellate Division reversed the judgment and directed judgment for plaintiff; that defendant deliver the note to plaintiff for can-

cellation; that the counterclaim be dismissed on the merits, and that the defendant be perpetually enjoined from beginning any action or proceeding upon the note.

George W. Morgan and Hiram Thomas for appellant.

George W. Mackellar and Martin A. Schenck for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CRANE and ANDREWS, JJ. Not sitting: CARDozo and McLAUGHLIN, JJ.

METROPOLITAN OPERA COMPANY, Respondent, v. OSCAR HAMMERSTEIN et al., Appellants.

Metropolitan Opera Co. v. Hammerstein, 163 App. Div. 691, affirmed.

(Submitted April 27, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 13, 1914, which affirmed a judgment in favor of plaintiff entered upon an order of Special Term sustaining a demurrer to the answer and granting plaintiff's motion for judgment in his favor upon the pleadings. The complaint set forth a written agreement between defendants and one Stotesbury wherein and whereby there was sold to said Stotesbury the defendants' opera house in Philadelphia and all their business of producing grand opera and kindred theatrical entertainments in this country, including their entire plant and good will, their contracts with artists and their production rights in certain operas. The contract recites that said Stotesbury was acting on behalf of plaintiff and others who were jointly interested as purchasers and who furnished part of the consideration. As part of said sale the defendants covenanted for ten years to retire from

the opera field in the cities of New York, Boston, Philadelphia and Chicago, "and not to be connected in any business that interferes with or encroaches upon the field now occupied by the Metropolitan Opera Company," and further covenanted that for a period of five years the Manhattan Opera House in the city of New York should not be opened to grand opera, the said covenant to run with the land. Thereafter defendants entered into a confirmatory agreement with plaintiff wherein they transferred to plaintiff all their good will in the business of producing opera in New York city and Boston and engaged for ten years not to enter the opera field in those cities. A similar confirmatory agreement and covenant as to the Philadelphia and Chicago field was entered into with the Chicago Grand Opera Company, a corporation formed by some of the persons interested with said Stotesbury in the said original agreement, and this company took over the costumes, scenery and scores which formed part of the subject-matter of the sale to Stotesbury. Thereupon the defendants wholly discontinued the production of grand opera in the United States, but thereafter they appealed to the plaintiff to release them from so much of the covenant as prevented their giving opera in New York city, and on plaintiff's refusal filed plans for an opera house, formed the Hammerstein Opera Company and announced their intention of presenting grand opera in the city of New York. To prevent this threatened violation of the covenant plaintiff filed this bill for an injunction. The answer admitted the making of the agreements and put in issue various allegations of the complaint. For a first separate defense the answer set up that the said agreements were illegal, null and void, in that the same were unlawful contracts in unreasonable restraint of trade and commerce among the states of the United States and with foreign nations, and in that the same were procured to be made and executed as part of an unlawful monopoly of and as unlawful attempts to monopolize the business, trade and commerce of the

United States, etc., and in that the same are unconscionable and contrary to public policy and good morals.

Ernest A. Bigelow, Henry A. Wise and Byrd D. Wise for Oscar Hammerstein, appellant.

John B. Stanchfield and William M. Parke for Arthur Hammerstein, appellant.

Paul D. Cravath, Edmond E. Wise and Frederick J. Powell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO, CRANE and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. CHARLES F. AMES, Appellant.**

People v. Ames, 172 App. Div. 962, affirmed.

(Argued April 30, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 4, 1916, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of practicing medicine without a license.

Alexander S. Drescher and Noah Seedman for appellant.

Harry E. Lewis, District Attorney (Harry G. Anderson of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CARDENZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ. Absent: COLLIN, J.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM H. WILLIAMS, Appellant.**

People v. Williams, 176 App. Div. 898, affirmed.

(Argued April 30, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 20, 1916, which affirmed a judgment of the Ontario County Court rendered upon a verdict convicting the defendant of the crime of forgery in the second degree.

William S. Moore and John Colmey for appellant.

Albert H. Clark and N. D. Lapham for respondent.

Judgment affirmed; no opinion.

Concur: COLLIN, CARDOZO, POUND, McLAUGHLIN and CRANE, JJ. Dissenting: HISCOCK, Ch. J., and ANDREWS, J.

**MARTIN MCHARG, Respondent, v. LEO F. ADT,
Appellant.**

McHarg v. Adt, 168 App. Div. 782, affirmed.

(Argued April 30, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered September 26, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant's servant in operating an automobile in which plaintiff was riding, resulting in a collision between said automobile and a wagon. Defendant's wife, while riding in his automobile driven by a chauffeur in his employ, noticed a woman lying by the roadside badly injured. She went to the

injured woman's assistance and directed the chauffeur to go in the automobile for a physician. In accordance with this direction the chauffeur procured the plaintiff, a practicing physician, to enter the defendant's automobile and while conveying plaintiff to the place where the injured woman was lying the accident resulting in the injuries complained of occurred. Defendant claimed that his wife had no right to send the chauffeur for a physician, as such act had nothing to do with the concerns of the appellant or of his family, and that consequently he could not be held liable for any negligence of the chauffeur when acting under the orders of the wife on this occasion.

Neile F. Towner for appellant.

Rollin B. Sanford for respondent.

Judgment affirmed, with costs; no opinion.

Concur: **HISCOCK**, Ch. J., **CARDOZO**, **POUND**, **McLAUGHLIN**, **CRANE** and **ANDREWS**, JJ. Absent: **COLLIN**, J.

ADELE HEISSENBUTTEL, Appellant, *v.* **MARK C. MEAGHER**, Respondent.

Heissenbuttel v. Meagher, 162 App. Div. 752, affirmed.

(Argued April 30, 1917; decided May 15, 1917.)

APPEAL from a judgment entered June 25, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained through the negligence of the defendant. Plaintiff while waiting to board a street car in the city of New York was struck by defendant's automobile and received the injuries complained of. The defense was that at the time of the acci-

dent the automobile was being operated by the defendant's adult son for his own use and purposes.

Theodore B. Chancellor for appellant.

Stephen P. Anderton and *Stephen H. Philbin* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CARDZOZO, POUND, CRANE and ANDREWS, JJ. Absent: COLLIN, J. Not sitting: McLAUGHLIN, J.

HERBERT A. WEEKS, Respondent, *v.* HENRY DOMINY et al., Appellants, and WILLARD N. BAYLIS et al., Respondents, Impleaded with Others.

Weeks v. Dominy, 161 App. Div. 414, affirmed.

(Argued May 1, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 25, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to determine title to real property. The land in question was situated at the easterly end of Long Island on Napeague beach, extending from Gardner's bay south to the Atlantic Ocean. Plaintiff's title was deduced through a written chain starting from the colonial charter granted in 1686 by Governor Dongan as colonial governor to the freeholders and inhabitants of the town of Easthampton, followed by a conveyance on March 15, 1882, by the trustees of the freeholders of Easthampton to Arthur W. Benson, recorded October 25, 1882. The Dominy title was claimed from three sources: An alleged deed from Gardiner Miller to Nathaniel Dominy, dated March 10, 1795, recorded August 15, 1881; an alleged deed from trustees of Easthampton to Nathaniel Dominy in 1798 (but not specifically pleaded) and title by

prescription from continued occupancy for over twenty years.

John C. Stein for appellants.

Lynn C. Norris, Edward M. Perry and Joseph F. Keaney for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CARDOZO, POUND,
McLAUGHLIN, CRANE and ANDREWS, JJ.

BRODY, ADLER & KOCH COMPANY, Appellant, v. BELLA W. HOCHSTADTER et al., Respondents.

Brody, Adler & Koch Co. v. Hochstadter, 164 App. Div. 948, affirmed.

(Argued May 1, 1917; decided May 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 9, 1914, affirming a judgment in favor of defendants entered upon a verdict directed by the court. The action was brought by the purchaser under a contract for the sale and purchase of real property to recover from the vendors the down payment of \$5,000 and expenses incurred, on the ground that the title tendered was defective. Defendants' answer included a counterclaim praying for specific performance. A defect was claimed in the title on account of the invalidity of certain foreclosure proceedings through which defendants had derived title.

Lewis M. Isaacs for appellant.

Henry M. Bellinger, Jr., and Sol Kohn for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CARDOZO, POUND,
CRANE and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. GERTRUDE STARK, Appellant.**

People v. Stark, 172 App. Div. 967, appeal dismissed.
(Submitted May 7, 1917; decided May 15, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 28, 1916, which affirmed a judgment of the Court of Special Sessions in the county of Kings convicting the defendant of unlawfully practicing medicine. The motion was made upon the ground of failure to file return.

Harry E. Lewis, District Attorney (Ralph E. Hemstreet of counsel), for appellant.

Henry C. Neuwirth for respondent.

Motion granted and appeal dismissed unless within thirty days appellant files return and serves necessary copies of case on appeal, in which case motion is denied.

**FREDERICK PYNE, an Infant, by ALICE P. MATHER, His
Guardian ad Litem, Respondent, v. THE CAZENOVIA
CANNING COMPANY, Appellant.**

(Submitted May 7, 1917; decided May 15, 1917.)

MOTION to amend remittitur. (See 220 N. Y. 126.)

Motion granted and remittitur amended so as to read: Judgment is reversed and verdict set aside, but as a new trial cannot be had by reason of plaintiff's death, none will be ordered.

MATTHEW T. GOLDSBOROUGH, JR., Respondent, v. RICHARD F. GOLDSBOROUGH, Appellant.

(Submitted May 7, 1917; decided May 15, 1917.)

Motion for re-argument denied, with ten dollars costs.
(See 220 N. Y. 755.)

**THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
GEORGE MINKOWITZ, Respondent.**

(Submitted May 7, 1917; decided May 15, 1917.)

Motion for re-argument denied. (See 220 N. Y. 399.)

**TOWN OF OYSTER BAY, Respondent, v. EMIL J. STEHLI,
Appellant.**

Town of Oyster Bay v. Stehli, 189 App. Div. 257, affirmed.
(Argued May 2, 1917; decided May 22, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 30, 1915, reversing a judgment in favor of defendant entered upon a verdict directed by the court in an action of ejectment to recover possession of certain premises in the town of Oyster Bay. Plaintiff bases his title upon the patent from Governor Andros, dated September 27, 1677. The questions on appeal were: "1. Whether the plaintiff sufficiently complied with the burden of proof on it to show that the *locus in quo* did not fall within the premises excepted in the patent to it from Governor Andros, which is the basis of its claim of title to the lands in question. 2. Whether the defendant has affirmatively proved that the *locus in quo* was included within the exception in this patent. The defendant's contention in this respect is based on the claim that the premises in question were conveyed by a certain Indian deed prior to the date of the patent to the town and that title thereto, therefore, fell within the provision of the patent, excepting rights by patent or other lawful claim. 3. Whether the town's title to the premises in question, if it derived any under its patent, was divested by the so called "clean up" Indian deed and the town's resolution and allotment.

Lynn C. Norris and Edward M. Perry for appellant.

Henry A. Uterhart, John J. Graham and Alfred M. Schaffer for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CARDENZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

**LOUIS FONTANELLA, Appellant, v. NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Respondent.**

Fontanella v. N. Y. C. & H. R. R. Co., 164 App. Div. 941, affirmed.

(Argued May 2, 1917; decided May 22, 1917.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 22, 1914, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action under the Employers' Liability Act to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant, his employer. Through the falling of a manhole cover the plaintiff's leg was injured resulting in its amputation. The complaint was dismissed "on the ground that the evidence fails to establish that a notice under the Employers' Liability Act was served by the plaintiff upon the defendant, stating the time, place and cause of the accident." Plaintiff contended that his statement to defendant's claim agents, consisting of questions and answers reduced to writing and signed by him, was in form and substance the notice required by statute.

William G. Cooke and Howard O. Wood for appellant.

Robert A. Kutschbock and Alex. S. Lyman for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ. Not voting: CARDozo, J.

TOWN OF SMITHTOWN, Respondent, v. EDWIN A. CRUIKSHANK, Appellant.

Town of Smithtown v. Cruikshank, 164 App. Div. 954, affirmed.
(Argued May 8, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 5, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action of ejectment. The action was brought to recover a parcel of 182/1000 of an acre of land on the Nissequogue river, Smithtown, described as follows: "Commencing at a stone monument on the northeasterly side of Landing Avenue and running thence north $46^{\circ} 43'$ east in a straight line to another stone monument about eighty-one (81) feet; thence running north $41^{\circ} 37'$ west sixty-six and four-tenths (66.4) feet to the easterly side of Nissequogue River; thence running southwesterly along the southeasterly side of Nissequogue River until it comes to Landing Avenue, and thence running southerly along the northeasterly side of Landing Avenue to the place of beginning." The defendant was in possession of this property under a deed dated October 24, 1905, and after his purchase had fenced in the property and built a boathouse thereon. Plaintiff claimed title under a grant from the original patentee.

George W. Wingate for appellant.

George B. Keeler for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CARDozo, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

ALICE G. RYCROFT, Appellant, v. GEORGE B. POST, JR., et al., Comprising the Firm of Post & Flagg, Respondents.

Rycroft v. Post, 164 App. Div. 942, affirmed.

(Argued May 3, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 7, 1914, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term in an action for conversion of certain stocks. These stocks were carried by the defendants in an account called "Henry Clay Pierce, Esq., Special," and were all sold on or prior to August 18, 1903, when the account showed a loss of \$12,662.63, which loss was paid by Mr. Pierce. The defendants alleged that they never knew Mrs. Rycroft in any of the transactions involved. The account was opened by Mr. Pierce. The defendants looked to Pierce for margin and he furnished it. All orders to buy or sell were given by Pierce, and the final loss was paid by him. She never received a statement from Post & Flagg nor asked them for one. It was not until August 2, 1909, that Mrs. Rycroft communicated with Post & Flagg with respect to the account or did anything to intimate that their handling of it had been in any respect improper. Prior to the bringing of the suit, Mrs. Rycroft sued Mr. Pierce for the conversion of all these stocks except Virginia-Carolina Chemical. The complaint in that action was verified January 9, 1911. The answer of the defendant in that action contained, among other things, a counter-claim for money loaned and advanced for carrying these stocks and the Virginia-Carolina Chemical, including the payment of the \$12,662.63 deficit on the final closing of the account. After various proceedings, that action was settled, Mr. Pierce paying the plaintiff \$30,000 and canceling loans and advances which he had made to her aggregating almost \$44,000, and receiving a general

release in the usual form. This release is pleaded by the defendants here as a bar to this action.

Robert Stewart, Edgar M. Cullen and Ralph G. Barclay for appellant.

Alton B. Parker and Roswell S. Nichols for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CARDODOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

**HENRY E. HOOD, Respondent, v. NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.**

Hood v. N. Y. C. & H. R. R. Co., 164 App. Div. 917, affirmed.
(Argued May 4, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered October 12, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to establish and to enjoin defendant from obstructing a right of way. The plaintiff claimed an easement over the roadway on the defendant's right of way for ingress to and egress from his house and premises acquired by use for that purpose for more than twenty years, on the ground that it is necessary, it being the only means of ingress to and egress from his premises, and that it had been used for such purposes openly, visibly, notoriously and without objection or obstruction on the part of the owners or occupants of the said railroad right of way for more than twenty years.

Amos Van Etten for appellant.

N. A. Calkins for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CARDODOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

EDWARD BOWMAN, Respondent, v. JAMES E. STEWART et al., Appellants.

Bowman v. Stewart, 184 App. Div. 923, affirmed.

(Argued May 4, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 15, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the loss of a canal boat. Plaintiff contended that the defendants were bailees of said boat for hire; that the defendants were negligent in overloading the boat for a trip over an unknown channel; that they were negligent in towing the boat with a hawser one hundred and fifty feet long and going through a channel from seventy to eighty feet wide, and that they were negligent and careless in the method used in their endeavor to extricate the boat from her grounded position, thereby causing her to sink. Defendants contended that under the contract the defendants were absolved from any responsibility in connection with the care of the boat and that the defendants were not responsible for any damage which the boat suffered by reason of the accident, and also that the plaintiff failed to show any negligence for which the defendants were responsible.

Clarence R. King and Edward Schoeneck for appellants.

Wordsworth B. Matterson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CARDODOZ, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

**THE TAX LIEN COMPANY OF NEW YORK, Respondent, v.
MARY E. BIRD, Appellant.**

Tax Lien Co. of New York v. Bird, 163 App. Div. 957, affirmed.
(Submitted May 4, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 6, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a transfer of tax lien brought pursuant to the provisions of the charter of the city of New York, as amended by chapter 490 of the Laws of 1908. The defense was that there was no adequate description of the property subject to the tax assessments or tax lien and as a counterclaim the answer alleged facts amounting to a plea of title in fee and of an unjust adverse claim by plaintiff and prayed affirmative judgment, barring the plaintiff, respondent, from all claim or assertion of title to said property under the transfer of tax lien set forth in the complaint, upon the ground that the tax lien and transfer thereof were void and invalid.

John H. Rogan and G. Arnold Moses for appellant.

August Weymann for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CARDOZO, POUND,
CRANE and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. ARTHUR WALDENEN, Appellant.**

(Argued May 7, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Court of General Sessions of the Peace in the county of New York, rendered January 22, 1917, upon a verdict convicting the defendant of the crime of murder in the first degree.

William S. Bennet and *Emory R. Buckner* for appellant.

Edward Swann, *District Attorney* (*Robert C. Taylor* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: **HISCOCK**, Ch. J., **CHASE**, **CUDDEBACK**, **HOGAN**, **CARDOZO**, **POUND** and **McLAUGHLIN**, JJ.

BELTING AND MACHINERY COMPANY, Respondent, *v.* **CITY OF CORNING**, Appellant.

Belting & Machinery Co. v. City of Corning, 164 App. Div. 969, affirmed.

(Argued May 7, 1917; decided May 22, 1917.)

APPEAL from a judgment entered November 19, 1914, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment in favor of plaintiff upon the verdict. Plaintiff alleged the making of a written contract, dated September 5, 1906, to furnish and install two gas engines, one gas producer and two triplex power pumps for defendant in its municipal water plant for \$20,725, upon which there has been paid two payments amounting to \$17,403.75, leaving unpaid \$3,321.25. Additional work and materials, amounting to \$222.04, are alleged to have been furnished. The answer, among other defenses, alleged that the said written contract was void under the provisions of the Labor Law, in that it violated sections 3 and 14 of said law, by omitting therefrom the stipulations and provisions required by said sections to be inserted in contracts of that character made with municipal corporations. It also set forth as a counterclaim the payment of the said sum of \$17,403.75 by defendant upon said void contract, and a further claim for damages. Plaintiff in reply alleged that the furnish-

ing of the machinery was an extraordinary emergency within the provisions of said section 3 of the said law, and that having accepted the machines the defendant was estopped from asserting the invalidity of the contract.

James O. Sebring and Justin V. Purcell for appellant.

Fred A. Robbins for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, CUDDEBACK, HOGAN and McLAUGHLIN, JJ.
Dissenting: POUND, J. Not voting: HISCOCK, Ch. J., and CARDODOZO, J.

JAMES N. JARVIE, Appellant, v. CHRISTINA ARBUCKLE et al., as Administrators of the Estate of JOHN ARBUCKLE, Deceased, et al., Respondents.

Jarvie v. Arbuckle, 163 App. Div. 199, affirmed.

(Argued May 7, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 10, 1914, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury. The action was brought by plaintiff, the retiring member of the firm of Arbuckle Brothers, to recover the sum of \$156,087.54 which the plaintiff, after he had retired from the firm on June 1, 1906, was called upon by the continuing partners in December, 1909, to pay and which he did pay under protest, and under an agreement providing that the payment should be made without prejudice to his rights under the written agreement. It was the plaintiff's contention at the time he made the payment that said sum represented a debt of the former firm which the respondents, the continuing partners, were obligated to assume and pay by the terms of the agreement of April 4, 1906. The agreement in question was made on April 4, 1906. The value of the plaintiff's interest in the copartnership property, as fixed by the defendants, was

fully liquidated and paid to him, with the exception of a single item which is not material on this appeal, on or before December 1, 1907. After the plaintiff's interest had been fully liquidated and in December, 1909, the United States government asserted a claim for unpaid duties on sugar imported by the firm prior to November, 1907. It was his alleged proportion of these unpaid duties which the defendants called upon plaintiff to pay and for which recovery was sought in this action.

Lewis H. Freedman and *Adrian H. Larkin* for appellant.

William N. Dykman and *Arthur E. Goddard* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, CARDOZO and POUND, JJ. Not sitting: McLAUGHLIN, J.

JAMES N. JARVIE, Appellant, *v.* CHRISTINA ARBUCKLE et al., as Administrators of the Estate of JOHN ARBUCKLE, Deceased, et al., Respondents.

Jarvie v. Arbuckle, 168 App. Div. 208, affirmed.
(Argued May 7, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 10, 1914, affirming a judgment in favor of defendants entered upon a verdict. The complaint alleged that on April 4, 1906, and for many years prior thereto the plaintiff, the defendants William A. Jamison, John Arbuckle, the defendants' intestate, and one William V. R. Smith were copartners doing business under the name of Arbuckle Brothers; that on said date a written agreement was entered into pursuant to which the plaintiff was to retire on June 1, 1906, and which provided, among other things, that Arbuckle and Jamison were to acquire the interests of Jarvie and Smith in the

assets of the copartnership and were to pay certain sums therefor, and Arbuckle and Jamison agreed "to assume, pay, and discharge all debts, liabilities and obligations of the copartnership, and to assume all outstanding leases, agreements and contracts of said copartnership;" that of the amounts to be paid Jarvie twenty-five per cent of his entire share was to be paid on June 1, 1906, and twenty-five per cent semi-annually thereafter, the last payment to be made on December 1, 1907; that on the 1st day of December, 1907, there was due and owing Jarvie on account of his share in the copartnership property from the said Arbuckle and Jamison according to said agreement the sum of \$1,647,862.32, payment of which was duly demanded, and none of which sum was paid, except the sum of \$1,595,094.12, leaving a balance due and owing and unpaid of \$52,768.20, with interest thereon from December 1, 1907, for which amount judgment was demanded. The answer admitted the existence of the copartnership and the making of the written agreement, but denied that the amount sued for was due and owing, and a separate defense set up that in determining the amount to be paid plaintiff on account of his interest in the business and assets of said copartnership as aforesaid, they computed and took account of the assets and liabilities of said copartnership, and that through mutual mistake certain sums due certain Pittsburg employees of the firm had not been included in the account or charged against Jarvie which sum amounted to the amount charged sued for in the action.

Lewis H. Freedman and Adrian H. Larkin for appellant.

William N. Dykman and Arthur E. Goddard for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, CARDOZO and POUND, JJ. Not sitting: McLAUGHLIN, J.

ROXY M. SMITH et al., as Executors of WILLIAM V. R. SMITH, Deceased, Appellants, v. WILLIAM A. JAMISON et al., as Administrators of the Estate of JOHN ARBUCKLE, Deceased, Respondents.

Smith v. Jamison, 170 App. Div. 78, affirmed.

(Argued May 7, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 1, 1915, affirming a judgment in favor of defendants entered upon the report of a referee. Arbuckle Brothers was a copartnership composed of John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison. It was dissolved April 4, 1906. The articles of copartnership of 1895 were then in force. The Messrs. Smith and Jarvie retired from the firm; the Messrs. Arbuckle and Jamison continued the business. Mr. Smith commenced his action for the breach of the dissolution agreement. In 1906 the firm of Arbuckle Brothers were operating under copartnership articles which provided that "the withdrawal of a partner shall not work a dissolution, but that the remaining partner shall continue the business without stoppage, or interruption, and shall pay the withdrawing partner, or his estate, his net interest in the business and in the real and personal property of the firm as of the date of his withdrawal or death." When Smith and Jarvie retired, the four partners made a second agreement providing that "the said Arbuckle and Jamison agree to assume, pay and discharge all debts, liabilities and obligations of the copartnership, and to assume all outstanding leases, agreements and contracts of said copartnership. The said Arbuckle and Jamison agree with the said Smith to pay him, in money, the amount of the value of his share in the partnership taken as of January 1, 1906." Arbuckle and Jamison assumed debts to James Flood, Charles A. Edsall and William W. Kerr, being the amounts due them for services which under an agreement with Mr.

Arbuckle they had allowed to accumulate. The continuing partners charged against Mr. Jarvie's share of the assets his share of the three salaries and against Mr. Smith his share of the three salaries. The plaintiffs contended, "first, that any contract giving Flood, Kerr and Edsall an interest in the profits of the Pittsburg business was the personal contract of John Arbuckle, and not of the firm of Arbuckle Brothers; and, second, that even if this first contention is to be determined against them, the amount of such interest in the Pittsburg profits could not be charged proportionally against the retiring partners, because of the provisions of the dissolution agreement."

Lewis H. Freedman and *Adrian H. Larkin* for appellants.

William N. Dykman and *Arthur E. Goddard* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, CARDOZO and POUND, JJ. Not sitting: McLAUGHLIN, J.

CHARLES G. RIEHL, Appellant, *v.* ARTHUR C. AUSTIN, Respondent.

Riehl v. Austin, 168 App. Div. 856, affirmed.
(Submitted May 8, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 22, 1914, affirming a judgment in favor of defendant entered upon a verdict. The action was brought against the defendant as indorser to recover the amount due on a promissory note for \$3,000, dated May 25, 1909, made by the Architects' Standard Bronze Company, payable to its own order six months after date. Two defenses were interposed: (1) That the note had been paid, satisfied and discharged; and (2) that the defendant had been discharged from liability as indorser by the sale and surrender, without his knowledge or con-

sent, of certain collateral security for the payment of the note.

Frederick Stewart for appellant.

Morris A. Hulett and Henderson Peck for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, CARDOZO and POUND, JJ. Not sitting: McLAUGHLIN, J.

TEUNIS J. VAN DER BENT, Respondent, *v.* EMILY W. GILLING, Appellant.

Van Der Bent v. Gilling, 184 App. Div. 920, affirmed.

(Argued May 8, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 13, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel specific performance of the following agreement:

“SHOKAN, September 14th, 1912.

“For the sum of twelve hundred dollars received I, Emily Wilhelmina Gilling, hereby sell to Teunis J. van der Bent 40 acres of my property, including the woods and pond on the northwest side of my property, further to be described in proper form, when of the sum received I have paid the mortgage and interest owing to Alvah Bogart and I legally can dispose of this property by sale. And until this transfer of property has been legally made I undersign this document as proof of having received the full sum of twelve hundred dollars. In case any difficulty in title or otherwise may arise which would make this transfer of property impossible, I agree to return and pay back this amount on September 14th, 1913, with interest at 6 per cent per annum.

“EMILY W. GILLING.

“In presence of

“A. VAN DER HOOK.”

The defense was that the writing did not constitute a contract subject to specific performance owing to insufficiency of the description.

Charles G. Bond for appellant.

John G. Van Etten for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, CARDOZO and McLAUGHLIN, JJ. Dissenting: POUND, J.

**ANNA A. KLUEPFEL, Respondent, v. GEORGE M. WEAVER,
Appellant.**

Kluepfel v. Weaver, 164 App. Div. 968, affirmed.
(Argued May 8, 1917; decided May 22, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 24, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to quiet the title to real property. The plaintiff claimed title under a tax deed executed and delivered by the county treasurer of Oneida county to one William Vorhauer, who with his wife thereafter transferred the lots in question to Philip Kluepfel, who died and gave the property to the plaintiff, his wife, by will. Defendant claimed title by transfers from the original owners in fee, and contended that the sale for taxes and the deed based thereon were void for irregularities. Plaintiff argued that any irregularities were cured by section 132 of the Tax Law.

James Coupe and Henry F. Coupe for appellant.

Edward Lewis and F. E. Lewis for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, CARDOZO, POUND and McLAUGHLIN, JJ.

In the Matter of the Application of NANCY M. SANBORN, Respondent, to Punish EDWARD S. BARBER, Appellant, for Contempt and to Compel Him to Produce Certain Books and Papers. Two Proceedings.

Matter of Sanborn (Barber), 178 App. Div. 896, appeals dismissed.
(Submitted May 14, 1917; decided May 22, 1917.)

MOTION in each of the above-entitled proceedings to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 2, 1917, which affirmed an order of Special Term directing the appellant herein to produce certain books and papers.

The motions were made upon the ground that the orders appealed from were not final orders and that permission to appeal had not been obtained.

Allan R. Campbell for motion.

Frank Hendrick opposed.

Motions granted and appeals dismissed, with costs in each proceeding and ten dollars costs of one motion.

JAY C. COFFEY, Respondent, *v.* MARY COFFEY, as Executrix of PATRICK COFFEY, Deceased, Appellant.

Coffey v. Coffey, 177 App. Div. 890, appeal dismissed.
(Submitted May 14, 1917; decided May 22, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 24, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action for services.

The motion was made upon the ground that an appeal

did not lie as of right to the Court of Appeals, and that permission to appeal had not been obtained.

Philip A. Brennan for motion.

John B. Johnston opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

HOTEL HOLDING COMPANY, Appellant, v. WETHERBEE & WOOD, Respondent.

Hotel Holding Co. v. Wetherbee & Wood, 165 App. Div. 805, affirmed.

(Argued May 8, 1917; decided May 25, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 15, 1915, in favor of the defendant, upon the submission of a controversy under section 1279 of the Code of Civil Procedure. The plaintiff is the owner of the Hotel Gotham at Fifty-fifth street and Fifth avenue in the city of New York, and the defendant is the tenant thereof under a lease dated November 30, 1908. The question in dispute is whether or not the plaintiff can, under the terms of the lease, recover of the defendant money spent by the plaintiff in structural alterations to the hotel, made necessary by the widening of Fifth avenue, in the year 1911. The lease contained the following provision: "If any order or regulation of any of the municipal or city authorities or of any board or body hereafter having authority to exercise similar functions, shall, within five years from the date of the commencement of the term of this lease, require structural changes in the building on the demised premises, necessitated by reason of some latent structural defect existing at the time of the execution hereof, or by the widening of Fifth avenue or Fifty-fifth street, and concerning which said authorities or board at such time has jurisdiction to issue said order,

regulation or requirement, then the cost of complying therewith shall be borne and paid by the lessor, provided, however, that such order, regulation or requirement shall first have been reduced to judgment." Plaintiff contended that the order requiring removal of the encroachments was never reduced to judgment, and, therefore, the defendant was liable under its covenants to repair and to comply with orders of authorities.

Robert C. Beatty for appellant.

Alfred A. Wheat for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, CARDODO and POUND, JJ. Not sitting: McLAUGHLIN, J.

WILLIAM SCHMIDT, Appellant, *v.* JOSEPHINE HERTZ et al.,
Respondents, Impleaded with Another.

Schmidt v. Hertz, 165 App. Div. 905, appeal dismissed.

(Submitted May 9, 1917; decided May 25, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 18, 1914, affirming a judgment in favor of defendants, respondents, entered upon a decision of the court at a Trial Term without a jury in an action to foreclose a mechanic's lien. The respondents contended that the appeal was improperly taken from an order of the Appellate Division instead of from a judgment entered thereon.

J. Wilson Bryant and *Robert S. Mullen* for appellant.

S. N. Tuckman and *Meyer Boskey* for respondents.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, CARDODO and McLAUGHLIN, JJ.

RUSSELL FOLAND, Suing on Behalf of Himself and Other Holders of Third Mortgage Bonds of the INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, Appellant, v. GEORGE J. GOULD, Respondent, Impleaded with Others.

Foland v. Gould, 163 App. Div. 947, affirmed.

(Argued May 9, 1917; decided May 25, 1917.)

APPEAL from a judgment, entered November 20, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to the complaint and granting defendants' motion for judgment on the pleadings. The complaint sets out in substance that in 1908 defendants were directors of a corporation and plaintiff was the holder of certain of its third mortgage bonds; that default occurred in the payment of interest on said bonds; and on application of the trustee under the mortgage securing the same a receiver was appointed in the Federal courts February 28, 1908. Because of default in payment of coupons of the second mortgage bonds the receivership was extended to that issue April 24, 1908. It was further alleged that two years later a protective committee was formed at the instance of defendants which called for a deposit of the third mortgage bonds, and that about five-sixths of the issue was thus deposited. Plaintiff, however, did not deposit his securities. In May, 1911, pursuant to the deposit agreement, a plan of reorganization was proposed and accepted and June first of that year was fixed as the last day when bondholders who had not deposited might so deposit and join in the benefits of the plan. Subsequently the road was sold under a decree of foreclosure and bid in by the bondholders, the committee tendering its securities in part payment of the purchase price. To the complaint was annexed and made a part thereof this plan, from which it appears that a discrimination was to

be exercised in the distribution of the new securities against those who, like the plaintiff, had failed to originally deposit their securities with the reorganization committee. This complaint was directed solely against the three defendants as individuals, plaintiff's counsel defining the action as one "brought against persons occupying a fiduciary or trust relation to property whereby they may be compelled to account for such property, and is brought to compel them to account."

Carlisle Norwood and George S. Daniels for appellant.

Robert B. Knowles for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, CARDOZO and McLAUGHLIN, JJ.

TIMOTHY M. GRIFFING, Respondent, v. EDWARD W. VANDERBILT, Appellant, Impleaded with Another.

Gripping v. Vanderbilt, 164 App. Div. 953, affirmed.

(Argued May 9, 1917; decided May 25, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 7, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the Suffolk County Court on trial at Special Term in an action to foreclose a mortgage. The answer set up three counterclaims for which setoffs against the amount secured by said mortgage were claimed by the defendants, in substance as follows.

1. That the mortgage in question included payment of a certain judgment in favor of plaintiff against appellant rendered September 24, 1908, for \$2,792.96; that this judgment included the amount due from appellant to Owen & Sturges for legal services rendered in conjunction with plaintiff in certain unsuccessful proceedings to declare appellant incompetent; that Owen & Sturges

were not paid by plaintiff, but sued appellant for their claim, and he was obliged to settle said action and pay them \$1,950. Setoff of \$1,950 with interest at the rate paid on said mortgage was claimed. 2. That after the giving of said mortgage plaintiff refused to satisfy the judgment, by reason of which appellant was for a time unable to place a loan on certain property in Brooklyn, to replace a prior mortgage thereon which in consequence was foreclosed, but before a sale, appellant, by motion, succeeded in having the judgment satisfied, but was obliged to pay costs of foreclosure and extra interest on the new loan amounting in all to \$435.74, for which offset is claimed. 3. That plaintiff agreed with appellant to charge \$1,400 for services subsequent to the judgment, but presented a bill for \$2,375; meantime issued execution on the judgment and threatened to sell property of appellant levied upon thereunder unless the bill of \$2,375 was paid, and, therefore, under duress of goods appellant gave the mortgage for an amount including \$2,250 of the bill of \$2,375 and thereby overpaying plaintiff \$850, for which latter amount offset was claimed.

Arthur Lovell for appellant.

Percy L. Housel, Joseph M. Belford and Robert P. Griffing for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, CARDENZO and McLAUGHLIN, JJ.

H. P. NELSON COMPANY, Respondent, *v.* GUSTAV H. POPPENBERG, Appellant.

Nelson Co. v. Poppenberg, 166 App. Div. 967, affirmed.
(Argued May 9, 1917; decided May 25, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 16, 1915, affirming a judgment in

favor of plaintiff entered upon a verdict in an action to recover for pianos sold and delivered. The answer of defendant did not put in issue the sale and delivery or value of the pianos, but counterclaimed for the value of a certain automobile involved in a transaction which took place a year and three months before the sale of the pianos. The counterclaim asserted that on July 26, 1912, plaintiff agreed to purchase a certain automobile of defendant, to be paid for by delivering to defendant thirty-six pianos; that the automobile was to be delivered not later than July tenth, and that plaintiff had refused to perform its part of this contract, while defendant was ready and willing to carry out the agreement, and that the automobile was held by defendant ready for delivery to plaintiff, alleging damages thereby.

Frank Gibbons for appellant.

Simon Fleischmann for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, CARDozo and McLAUGHLIN, JJ.

EMMA C. SCHERMERHORN et al., on Behalf of Themselves and Others, Appellants, v. CHARLES M. BEDELL, Respondent.

Schermerhorn v. Bedell, 168 App. Div. 445, affirmed.
(Argued May 10, 1917; decided May 25, 1917.)

APPEAL from a judgment entered July 11, 1914, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. The decision of the trial court adjudged that the owners of the Ballard tract in the city of Syracuse, N. Y., subjected the said tract to a common restric-

tion and uniform plan in respect to the manner of its improvement and occupation; and that the same was for the benefit of each particular lot of said tract and could be enforced by the owner of one parcel against the owner of any other parcel who had either actual or constructive knowledge thereof, and required the defendant, who was the owner of lot 1, block 4, of the Ballard tract on the south-eastern corner of South Salina street and McKinley avenue in said city of Syracuse, N. Y., to remove the building, which he had constructed, from that portion of the lot which runs parallel with McKinley avenue and extends eleven feet southerly from the south line of said street.

George F. Park for appellants.

William Rubin for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK,
HOGAN, CARDozo and McLAUGHLIN, JJ.

**BENZ AUTO IMPORT COMPANY OF AMERICA, Appellant, v.
JESSE FROEHLICH, Respondent.**

Benz Auto Import Co. of America v. Froehlich, 161 App. Div. 929, affirmed.

(Submitted May 10, 1917; decided May 25, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 25, 1914, affirming a judgment in favor of defendant entered upon a verdict in an action to recover for goods alleged to have been sold and delivered. The complaint alleged that the plaintiff, between January 2, 1912, and June 7, 1912, and on various dates and in various amounts and at the request of the defendant, sold and delivered to the defendant certain motor cars and accessories at an agreed price; that this purchase price was payable within ten days after delivery, and that the

money was due and owing and no part of it had been paid by the defendant to the plaintiff. Under a general denial defendant offered evidence tending to establish that he did not buy the goods; that there had been no sale to him, and that he never promised to pay therefor, but that the goods were delivered to him pursuant to an agreement that he was to take them in payment of a debt due to him by Benz & Cie, and the plaintiff should charge the amount thereof to Benz & Cie, to whom the plaintiff was indebted.

Charles Oakes for appellant.

Jesse S. Epstein for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN and CARDZOZO, JJ. Not sitting: McLAUGHLIN, J.

ANNA W. WOODWARD, Appellant, v. NEW YORK RAILWAYS COMPANY, Respondent.

Woodward v. New York Railways Co., 164 App. Div. 658, affirmed.

(Argued May 11, 1917; decided May 25, 1917.)

APPEAL from a judgment, entered December 18, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff while driving a single horse and carriage across Eighth avenue in the city of New York at its intersection with One Hundred and Thirtieth street was struck by one of defendant's cars and received the injuries complained of. The defendant argued that the plaintiff was guilty of contributory negligence as matter of law, because after

seeing defendant's car upwards of a block away, when she started to drive across Eighth avenue, she did not again carefully observe the approach and speed of the car just as she was about to cross the track.

Frank Verner Johnson for appellant.

Frederick J. Moses and *James L. Quackenbush* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN and CUDDEBACK, JJ. Dissenting: HOGAN and CARDOZO, JJ. Not sitting: McLAUGHLIN, J.

SAMUEL GOLDBERG, Respondent, v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Goldberg v. N. Y. C. & H. R. R. Co., 164 App. Div. 389, affirmed.

(Argued May 11, 1917; decided May 25, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 12, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. It is alleged in the complaint that on or about September 17, 1912, at New York city, the defendant, in consideration of the payment to it by the plaintiff of the usual freight rate for the transportation of dry goods from New York city to Cincinnati, agreed safely to carry to Cincinnati and there deliver to the plaintiff certain property of the value of \$693.75, and that defendant did not carry said goods pursuant to said agreement, but on the contrary permitted same to become lost or stolen in transit. In its answer defendant set up as a separate defense that if it received the property mentioned in the complaint for transportation the same was received by it pursuant to the terms of a written agreement wherein it was described as consisting of dry

goods; that defendant had theretofore filed with the interstate commerce commission copies of its classifications and schedules of rates for the transportation of dry goods and furs from New York to Cincinnati, which provided for a first-class rate on dry goods and double first-class rate on furs; that defendant relied upon the description contained in the bill of lading issued by it for the transportation of the property and agreed to transport same at the rate provided in said tariffs and classifications for the transportation of dry goods; that the property was stolen in transit, and thereafter defendant learned that the case contained furs and not dry goods.

William Mann and Alexander S. Lyman for appellant.

Milton H. Goldsmith and Max Horowitz for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, CARDozo and McLAUGHLIN, JJ.

THE UNITED STATES ASPHALT REFINING COMPANY, Appellant, v. COMPTOIR NATIONAL D'ESCOMPTE DE PARIS, Respondent.

U. S. Asphalt R. Co. v. Comptoir Nat. D'Escompte De Paris, 166 App. Div. 64, affirmed.

(Argued May 11, 1917; decided May 25, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 17, 1915, affirming a judgment in favor of defendant entered upon an order of Special Term granting defendant's motion for judgment in its favor upon the pleadings. The action was begun on June 30, 1914, by the granting of a warrant of attachment of funds of defendant on deposit in the city of New York, based upon a complaint and affidavit. The complaint

alleged that the plaintiff is a South Dakota corporation doing business in New York; that the defendant is a French corporation having its principal office in Paris, France, and a branch banking office in London, England, and that on or prior to December 13, 1913, the defendant collected on six certain drafts drawn by plaintiff against A. Grimwood & Co., Ltd., of London, England, the sum of £610/10s., from which it deducted commissions of 8s. 6d., leaving a balance in its hands of £600/17s. 6d. "belonging to plaintiff," and then and there wrongfully converted said sum to its own use. Defendant demurred upon the grounds of lack of jurisdiction of the subject of the action and failure to state facts sufficient to constitute a cause of action.

William H. Blymyer for appellant.

Howard Thayer Kingsbury for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN and CARDODO, JJ. Not sitting: McLAUGHLIN, J.

FREEMAN C. HALLOCK, Respondent, v. ERIE RAILROAD COMPANY, Appellant.

Hallock v. Erie R. R. Co., 164 App. Div. 911, affirmed.

(Argued May 11, 1917; decided May 25, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 16, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action under the Federal Employers' Liability Act to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant, his employer. The complaint alleged that plaintiff was employed as a yard brakeman and that on the night of the accident he was

engaged in going along the tracks in defendant's yard making a record of the numbers of the cars on the respective tracks; that the night was dark and rainy, and the defendant negligently omitted to have the yards lighted, and that while plaintiff was engaged in his work, a string of cars at which he was working was struck by another string of cars with great violence, knocking plaintiff down, passing over his right foot, and rendering it necessary to amputate a large portion of the same. Negligence was charged on account of the negligent and careless manner in which said string of cars was allowed to go along said track. The complaint alleged, and the answer admitted, that the defendant and the plaintiff were both engaged in interstate commerce. The answer also admitted the incorporation of the defendant and the interstate character of its business; denied the other allegations of the complaint; set up contributory negligence, both as a defense and in mitigation of damages, and pleaded assumption of risk.

Warren J. Cheney for appellant.

J. W. Hollis for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK,
HOGAN, CARDOZO and McLAUGLIN, JJ.

In the Matter of the Application of THOMAS F. LEE
et al., Appellants, for a Writ of Habeas Corpus.

DE WITT H. LYON, as General Guardian of WILLIAM C.
LEE, an Infant, Respondent.

(Submitted May 21, 1917; decided May 25, 1917.)

Motion for re-argument denied, with ten dollars costs.
(See 220 N. Y. 532.)

THOMAS E. QUINN, Respondent, v. JOHN THATCHER & SON, Appellant.

Quinn v. Thatcher & Son, 178 App. Div. 906, appeal dismissed.
(Submitted May 21, 1917; decided May 25, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 20, 1917, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover on contract.

The motion was made upon the grounds that the affirmation by the Appellate Division was unanimous; that no question of law was involved; that the exceptions were frivolous and the appeal taken solely for the purpose of delay.

William B. Carswell for motion.

Benjamin Reass opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

In the Matter of the Petition of HERBERT E. SISSON, as State Commissioner of Excise, Respondent, for Revocation of Liquor Tax Certificate Issued to WLADYSLAW WISNIEWSKI, Appellant.

(Submitted May 21, 1917; decided May 25, 1917.)

Motion for re-argument denied, with ten dollars costs.
(See 221 N. Y. 494.)

THOMAS PIETRONIS, Appellant, v. DOBLER BREWING COMPANY et al., Respondents.

Pietronis v. Dobler Brewing Co., 168 App. Div. 928, affirmed.

(Argued April 27, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 11, 1914, affirming a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term in an action in equity to determine the rights of the parties thereto in and under a certain liquor tax certificate issued to the plaintiff for premises on East street and Champlain avenue, in the town of Stillwater, Saratoga county, N. Y., and to determine the rights of the plaintiff and the defendant Dobler Brewing Company under a certain assignment and power of attorney in and by which the plaintiff authorized and empowered the defendant company to act in his place and stead in all things relating to the surrender for rebate, the transfer of said certificate to any other person or to any other place, and for the purpose of the transfer from place to place to make, execute and file the notice of abandonment provided for in the Liquor Tax Law and all other papers necessary to be executed or filed in or about the transactions of surrendering or transferring said certificate, and constituting the defendant company his true and lawful attorney irrevocably, and also to determine the rights of the plaintiff and the defendant company under a certain contract known and designated in this case as a beer contract, in and by which the plaintiff agreed to sell no other lager beer upon his said premises or under said liquor tax certificate except the lager beer manufactured and sold to him by the defendant company.

Borden H. Mills for appellant.

Edward J. Halter for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOZO, McLAUGHLIN, CRANE and ANDREWS, JJ. Dissenting: HOGAN, J.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. EMANUEL JACKSON, Appellant.**

People v. Jackson, 175 App. Div. 929, affirmed.

(Argued May 14, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 3, 1916, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of having sold stock transfer tax stamps issued by the state comptroller without having obtained the written consent of that official, in violation of section 271a of the Stock Transfer Tax Law (Cons. Laws, chap. 60, as amd. by L. 1913, ch. 811, in effect Nov. 14, 1913).

Aaron William Levy for appellant.

Edward Swann, District Attorney (*Robert S. Johnstone* and *Leonard J. Obermeier* of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ. Absent: HISCOCK, Ch. J.

ELLA A. PIXLEY, Appellant, v. COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA, Respondent.

Pixley v. Commercial Travelers Mut. Acc. Assn. of America, 165 App. Div. 950, affirmed.

(Argued May 14, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department,

entered December 15, 1914, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action upon a policy of accident insurance. The defense was that the policy was issued and accepted in consideration of the membership fee and the warranties and agreements contained in the application, among which were the conditions that it should not extend to nor cover injuries of which there should be no external visible mark on the body of the insured nor to injuries or death resulting from or caused by poison, taken voluntarily, involuntarily or accidentally, and that if the insured met with an accident, there was no external, visible mark on his body, but that he died from the effects of a poison known as morphine taken by him, and that he did not come to his death through external, violent and accidental means.

Walter W. Chamberlain and *Eugene M. Bartlett* for appellant.

Carlton E. Ladd and *Adolph Rebadow* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: **CHASE, COLLIN, HOGAN, POUND, CRANE** and **ANDREWS, JJ.** Absent: **HISCOCK, Ch. J.**

CLARENCE M. HOWARD et al., Respondents, v. HENRY R. HOFFELD, Appellant.

Howard v. Hoffeld, 168 App. Div. 908, affirmed.

(Argued May 14, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 15, 1914, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court. Plaintiffs leased to defendant natural gas underlying their properties with the privilege of drilling therefor, defendant agreeing to compensate the owners for the lease by furnishing free gas and laying down the

pipes to carry such gas to the houses of the owners, or within twenty feet therefrom, and by paying a royalty on gas sold. Defendant entered upon plaintiffs' premises, drilled a well, found gas, but not in sufficient quantity for commercial purposes. He thereupon abandoned the premises. Plaintiffs insisted, under the lease, that it was the duty of the lessee to pipe the distance from the well to their respective houses so that they might use the gas which was in the well, which the lessee refused to do; whereupon the owners did it themselves and brought this action to recover the expense. Defendant contended that the lessee had the right to abandon the well and the lease upon discovering that he could not get gas enough to sell; that the construction of the contract, which required him not only to drill the test well, but to pay for piping gas to the houses of the owners, is unfair and unjust, and that the contract, fairly construed, gave him the right to abandon, at the time he did abandon, without making any compensation either in form of free gas, or free piping, or royalties to the owners.

Henry W. Killeen and Raymond C. Donnelly for appellant.

Walter W. Chamberlain for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ. Absent: HISCOCK, Ch. J.

ELLSWORTH J. JOHNSON, Respondent, v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Johnson v. N. Y. C. & H. R. R. Co., 164 App. Div. 906, affirmed.
(Argued May 14, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 10, 1914, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The plaintiff sought to recover the balance unpaid upon a carload of slate consigned by him from Bangor, Penn., about November 2, 1904, to one W. W. Wimett at Oneida, N. Y., and alleged to have been wrongfully delivered by defendant to one George W. Hawthorne, without the knowledge or consent of plaintiff or Wimett, the consignee, after deducting the sum of eighty-five dollars collected from said Hawthorne. It is alleged that shipment was made to Wimett upon the reliance of statements by Hawthorne that he was authorized to order slate for Wimett; but that Wimett did not authorize Hawthorne to order slate for him or in his behalf, or know that any order had been given or that any slate had been received by the defendant consigned to him until long after the same had been delivered to Hawthorne by the defendant and used in whole or in part by him, and that the whole transaction was without the knowledge or consent of Wimett. The defendant admitted that it received the shipment in question, and alleged that it promptly delivered the same to the consignee, and denied the other allegations of the complaint. It then sets up three separate defenses: (1) That plaintiff having collected eighty-five dollars from Hawthorne in part payment was estopped from alleging a wrongful delivery to Hawthorne; (2) that plaintiff having collected eighty-five dollars from George W. Hawthorne in part payment for said slate ratified the delivery to him, and (3) that plaintiff had full knowledge of the delivery of the carload of slate to Hawthorne on or about November 7, 1904, but made no protest and did not present a claim on account thereof until March, 1907, and is estopped from asserting it was wrongfully delivered to Hawthorne.

Gay H. Brown and Daniel E. Meegan for appellant.

D. C. Burke for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ. Absent: HISCOCK, Ch. J.

NICHOLAS FLYNN, Respondent, v. BRADLEY CONTRACTING COMPANY, Appellant.

Flynn v. Bradley Contracting Co., 166 App. Div. 920, affirmed.
(Argued May 15, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 22, 1915, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant. At the time of the accident plaintiff was in the employment of the defendant, which was engaged in constructing a section of the Lexington avenue subway between Eighty-second and Eighty-fourth streets, in the borough of Manhattan, New York city. While in the subway he was struck from behind by a car which had broken away from the men in charge of it.

Frederick L. C. Keating and Joseph A. Corbett for appellant.

Robert A. Kutschbock and Albert B. Quencer for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ.

TORRENCE M. BURTNETT, Respondent, v. ERIE RAILROAD COMPANY, Appellant.

Burtnett v. Erie R. R. Co., 165 App. Div. 984, affirmed.
(Argued May 15, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 5, 1915, affirming a judgment in favor

of plaintiff entered upon a verdict in an action under the Federal Employers' Liability Act to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant, his employer. While engaged in the performance of his duty as a brakeman plaintiff was thrown from the top of a car by the sudden stoppage of the train and received the injuries complained of.

William C. Cannon for appellant.

Thomas J. O'Neill and *Leonard F. Fish* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, HOGAN, POUND, CRANE and ANDREWS, JJ.
Dissenting: HISCOCK, Ch. J., and COLLIN, J.

LEONIE B. LUHMAN, Respondent, *v.* NEW YORK, WEST-CHESTER AND BOSTON RAILWAY COMPANY, Appellant.

Luhman v. N. Y., Westchester & Boston Ry. Co., 163 App. Div. 964, affirmed.

(Argued May 15, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 10, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. By this judgment the defendant was permanently enjoined from maintaining embankments and structures and operating its railroad on premises owned by it, and was required to remove such embankments, structures and railroad, and to pay the plaintiff \$281.47 for rental damages. It was decreed in the alternative, that on payment to the plaintiff by the defendant of \$2,800 as fee damages, and \$281.47 as rental damages, the necessary easements and rights to use such embankment and structures for the maintenance of its railroad were to be conveyed by the plaintiff to the defendant.

Both plaintiff's and the part of defendant's property in question was acquired by them subject to certain building restrictions running with the land. The answer, after denying the material allegations of the complaint, pleaded facts showing that the construction and operation of the railroad was a public convenience and necessity, and that the restrictions against the erection of such railroad on the right of way owned by it, on which the plaintiff relied as the basis of her cause of action, if such restrictions existed at all, were wholly void and without effect, being against public policy.

Louis Marshall, George S. Graham and Ralph P. Buell for appellant.

Clinton T. Taylor and Charles Everett Moore for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ.

CATSKILL NATIONAL BANK, Appellant, v. HERBERT W. LASHER et al., Respondents.

Catskill Nat. Bank v. Lasher, 165 App. Div. 548, affirmed.
(Submitted May 16, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 16, 1915, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term in an action on two promissory notes indorsed by defendants. The defense was duress; that a relative of the defendants having forged their indorsements on the notes, in order to compound and settle said felony, on demand of the plaintiff, defendants signed the writing on the back of the notes, in consideration of which the plaintiff agreed to and did desist from prosecuting upon said felony, and that there was no con-

sideration for the signing of said writing by the defendants; and that any indorsements or writing upon the notes mentioned in the complaint was a special promise to answer for the debt of another, and mentioned no consideration for such signatures to the memorandum on the back of the notes, and that there was no consideration therefor.

J. Stewart Ross for appellant.

H. Leroy Austin for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ. Not sitting: CHASE, J.

AUTOMATIC SPRINKLER COMPANY OF AMERICA, Appellant,
v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION,
LIMITED, OF LONDON, Respondent.

Automatic Sprinkler Co. of America v. Employers' L. Assur. Corp., Ltd., 163 App. Div. 671, affirmed.

(Argued May 16, 1917; decided June 5, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 31, 1914, which affirmed an order of the court at a Trial Term setting aside a verdict directed in favor of plaintiff and granting a new trial in an action upon a policy of liability insurance. The court entertained the motion to set aside the verdict and for a new trial upon a condition of the policy requiring an action brought upon the policy to be begun within ninety days after payment of loss, and it appearing from the evidence that the loss was paid on March 20, 1911, and that the action was not begun until October 12, 1911, the court granted the motion as a matter of law and not as a matter of discretion.

J. Stewart Ross for appellant.

Bertrand L. Pettigrew and *Walter L. Glenney* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs, including costs of Trial Term and the costs directed to be paid by the Appellate Division; no opinion.

Concur: CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ. Not voting: HISCOCK, Ch. J.

**WILL B. HULL, Appellant, v. ERNEST V. DUNLEVIE,
Respondent.**

Hull v. Dunlevie, 164 App. Div. 969, appeal dismissed.

(Argued May 16, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 10, 1914, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover a broker's commission for effecting a sale of certain property. The defense was that the plaintiff never procured a purchaser ready, willing and able to purchase the property at the defendant's price, or at any price, and that no sale of the property was ever in fact effected.

Eugene M. Bartlett for appellant.

James McCormick Mitchell and *Eugene Warner* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ.

THE ROSCOE COMPANY, Respondent, v. BERTHA H. LINDNER et al., Appellants.

Roscoe Co. v. Lindner, 166 App. Div. 889, affirmed.

(Argued May 16, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department,

entered December 30, 1914, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The action was brought to recover for lumber sold by plaintiff to John Lindner, a builder, payment being guaranteed by his wife, Bertha Helena Lindner. The defense was payment by an order on the owner of the house in which the lumber was used, given to the plaintiff by Mr. Lindner, and accepted by the owner, before the time agreed on for payment of the lumber. The court held that as a matter of law the order was not payment, but only security, and refused to submit to the jury the question of whether the order was given and accepted as payment.

Winifred Sullivan for appellants.

Theodore T. Baylor for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ.

ANNIE KIERNAN, Respondent, v. FREDERICK W. BUHLMAN et al., Appellants, Impleaded with Others.

Kiernan v. Buhlman, 166 App. Div. 908, affirmed.

(Argued May 17, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 31, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. Plaintiff being the owner of a plot of land in the town of Brighton, purchased adjoining premises, but through an error of the surveyor, who drew the deed, the land included in his description, if plotted, would have been located on the opposite side of the road, where her grantor did not own any property, but there was traced upon the face of the deed, at the end of the

written description, a map which the plaintiff contended did correctly describe the triangular parcel of land which she purchased. This action was brought to reform the deed and to restrain the defendants from interfering with plaintiff's possession or enjoyment of the parcel claimed by her.

William W. Armstrong for appellants.

Nelson P. Sanford for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
POUND, CRANE and ANDREWS, JJ.

**THE NORTHERN COUNTIES INVESTMENT TRUST, LIMITED,
Appellant, v. CHARLES F. STREET et al., Respondents.**

Northern Counties Investment Trust, Ltd., v. Street, 165 App. Div. 908, affirmed.

(Argued May 17, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 25, 1914, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to charge defendants as trustees for breach of their fiduciary duties either as directors of a corporation or as a committee for all of its second mortgage bondholders. The question was as to the liability of six of the seven directors of an insolvent corporation who, as directors, succeeded in arranging for a sale of all the company's property to pay its second mortgage bondholders (its stock being worthless and its first mortgage bondholders amply secured), and who then, as a self-appointed and so-called "readjustment" committee representing (as they contend) only depositing bondholders, having, according to the previous arrangement with the purchaser, bought the property at foreclosure sale, sold it at

an advance, and distributed the difference among the depositing bondholders alone. The question was whether they were liable to the non-depositing bondholders.

Alfred Jaretzki for appellant.

Charles E. Rushmore and *George N. Hamlin* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ.

ALBERT ADAMI et al., Appellants, v. DIETRICH O. GERCKEN, Respondent.

Adami v. Gercken, 164 App. Div. 472, affirmed.

(Submitted May 17, 1917; decided June 5, 1917.)

APPEAL from a judgment entered February 15, 1915, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term and directing judgment in favor of defendant. The action was brought for the specific performance of a written contract between the parties for the purchase of certain real estate in New York city. The answer alleged that the plaintiffs' title was derived through a referee's deed given pursuant to a judgment in a partition action and that certain grandchildren of Frederick Schwab, deceased, were not made parties defendants to said partition action, it being claimed that said grandchildren had a contingent interest in the said property pursuant to the will of said deceased. It was also claimed that there is an erroneous description of the property in the contract of purchase because of variations between the lines of East One Hundred and Fifty-first street as legally opened and the lines of Pontiac street as laid down on the map of Wilton as shown on a survey of the property.

Alfred Steckler and Levin L. Brown for appellants.

Edward D. Bryde for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
POUND, CRANE and ANDREWS, JJ.

**ELI H. BISHOP, Appellant, v. SMITH N. DECKER et al.,
Respondents.**

Bishop v. Decker, 166 App. Div. 890, affirmed.

(Argued May 18, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 22, 1914, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term. This action was brought to recover an abatement in the contract price of a tract of land upon the exchange by the plaintiff of a flat owned by him for this tract and another piece of Long Island acreage owned by the defendants. The action is framed upon the theory of legal remedy affording a party a reformation of a contract and conveyance of real property made under a mutual mistake as to the quantity conveyed and granting an abatement of the contract price for a deficiency. Under the contract of sale the tract of land in question was to contain forty-five acres, more or less. It actually contained twenty-five and thirty-six one-hundredths acres. The defense was that the contract provided for a trade in bulk.

Charles J. Ryan for appellant.

William S. Pettit and Charles C. Bunker for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
POUND, CRANE and ANDREWS, JJ.

MARY J. WARREN, Respondent, *v.* NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Warren v. N. Y. C. & H. R. R. Co., 165 App. Div. 946,
affirmed.

(Argued May 18, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 24, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the negligence of the defendant. The plaintiff after leaving one of defendant's trains in which she had been a passenger was passing along the sidewalk some distance from the defendant's railway station at the unincorporated village of Crittenden, in the town of Alden, Genesee county. She claims that she put her foot into a hole in the sidewalk and fell, sustaining serious injuries. According to plaintiff's testimony she fell at a place within the boundaries of the defendant's lands. Defendant contended that she fell several hundred feet away from the place where she claims she fell, on a sidewalk in front of property belonging to a third person, not a party to this action. The defendant contended further that the sidewalk on its premises was part of a public highway, and that, therefore, the defendant was under no obligation to repair the sidewalk.

Herbert W. Huntington for appellant.

George W. Watson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
POUND, CRANE and ANDREWS, JJ.

**MARGARET A. LYNCH, Respondent, v. ANNA MURPHY,
Appellant.**

Lynch v. Murphy, 165 App. Div. 908, affirmed.

(Argued May 18, 1917; decided June 5, 1917.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 18, 1914, affirming a determination of the Appellate Term which affirmed a judgment of the City Court of the city of New York in favor of plaintiff entered upon a verdict. The complaint alleged that immediately prior to October 30, 1905, an agreement was entered into between plaintiff and defendant wherein and whereby the defendant promised and agreed with the plaintiff that if the plaintiff would purchase any shares of the capital stock of the Columbia Carbide Company of South Dakota, a foreign corporation, and the corporation was not within a reasonable length of time thereafter a success or the plaintiff did not realize upon her interest in the corporation, the defendant would purchase from the plaintiff the said shares of stock so purchased by her and would pay to the plaintiff the amount which the said plaintiff should pay therefor, and interest; that the plaintiff fully kept and performed all the terms of said agreement on her part to be performed, and on October 30, 1905, purchased and took ten shares of said stock, paying therefor the sum of \$100; that more than a reasonable length of time has passed since such purchase and the plaintiff has not realized upon her interest in said corporation, and the corporation is not a success, but is in a dormant condition, doing no business, and the plaintiff has been unable to realize upon her interest in the corporation, upon her shares of stock, and on or about the 30th day of September, 1911, the plaintiff tendered to the defendant the said ten shares of stock and demanded from the defendant that she purchase the same from her and pay to her the said sum of \$100, the

amount that the plaintiff had paid therefor, and interest, but that defendant has neglected and refused to do so. The defendant alleged that the agreement or promise was a special promise to answer for the debt, default or miscarriage of a person other than this defendant, to wit, the Columbia Carbide Company of South Dakota, and that said promise was not nor was any note or memorandum thereof made in writing or subscribed by the party to be charged therewith.

Ralph Royall and Royall Victor for appellant.

Benjamin E. Messler for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ.

CASUALTY COMPANY OF AMERICA, Respondent, v. UNITED STATES CASUALTY COMPANY, Appellant.

Casualty Co. of America v. U. S. Casualty Co., 161 App. Div. 591, affirmed.

(Argued May 21, 1917; decided June 5, 1917.)

APPEAL from a judgment entered June 12, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department reversing a judgment in favor of defendant entered upon a decision of the court on trial at Special Term and directing judgment in favor of plaintiff. The action was brought against the defendant to recover the amount owing by the defendant to the plaintiff under a re-insurance contract or agreement executed and delivered by the defendant to the plaintiff, being one-half of the amount paid by the plaintiff under one of its policies, insuring one Elliott. The amended answer denied the material allegations of the complaint and set forth as a separate defense that the re-insurance contract sued upon was procured from defendant by fraud and misrepresentation on plaintiff's part, and alleged by way of counter-

claim that the re-insurance contract sued upon was issued by defendant with and on the understanding that the defendant should not be liable to the plaintiff if and in the event that the said Elliott should sustain accidental injuries whether fatal or non-fatal or suffer disease or illness while the said Elliott should be outside the limits of Canada, Europe and the United States, and that the territory of Alaska (where Elliott during its term met accidental death) should not be included as a part of the United States; that the said re-insurance contract by mutual mistake or by mistake on defendant's part and fraud on the part of the plaintiff, failed to express the true intention of the parties hereto in this respect and demanded judgment that the said contract be reformed and corrected accordingly and that the complaint be dismissed. To this counterclaim plaintiff replied, denying its material allegations, and praying for the relief demanded in the complaint.

Irving G. Vann, Carl Schurz Petrasch, William H. Griffin and A. L. Gutman for appellant.

Lyman A. Spalding, Theodore H. Lord and John H. Jackson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, CARDOZO, McLAUGHLIN and ANDREWS, JJ.

LUELLA SWARTWOOD, as Administratrix of the Estate of HARLEIGH SWARTWOOD, Deceased, Appellant, v. LEHIGH VALLEY RAILROAD COMPANY, Respondent.

Swartwood v. Lehigh Valley R. R. Co., 169 App. Div. 759, affirmed.

(Argued May 21, 1917; decided June 5, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 27, 1915, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial

in an action under the Federal Employers' Liability Act to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of the defendant, his employer. Plaintiff's intestate, a freight conductor, was called upon to take out a train. He took charge of it, checked up the cars upon his train-book and the train pulled out. Subsequently he was missed and his body was discovered near the starting point of the train upon one of the sidings used in shifting cars in making up trains. The circumstantial evidence pointed to the fact that he had been struck while between the rails of this siding by cars which were being "kicked" in upon such siding in the regular course of making up the outgoing trains. There was an entirely safe point outside of these particular tracks on either side of the same. The Appellate Division reversed upon the ground that to charge defendant with responsibility for the accident would require indulgence in speculation rather than in established facts or legitimate inferences.

Charles C. Annabel and *James O. Sebring* for appellant.

Riley H. Heath for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: *Hiscock*, Ch. J., *COLLIN*, *CUDDEBACK*, *HOGAN*, *CARDOZO*, *McLAUGHLIN* and *ANDREWS*, JJ.

ISABELLA KNUDTSEN, Appellant, *v.* HARMON L. REMMEL,
Respondent, Impleaded with Others.

KnudtSEN v. Remmel, 165 App. Div. 912, affirmed.

(Argued May 21, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 4, 1914, affirming a judgment in favor of

defendant entered upon a dismissal of the complaint by the court at a Trial Term. Plaintiff's assignor and defendant entered into a written contract by which the former was to raise money to develop and build a railroad to defendants' coal mines. The contract provided that said assignor was "to raise the money to pay for making the survey for said railroad which amount is to be taken from the sale of the bonds, but in case said bonds are not sold, the cost of said survey is to be repaid out of any funds that you or your associates, or the Arkansas Anthracite Coal Company may hereafter raise for the building of a railroad along said line." The survey was made, but said assignor was unable to sell the bonds, and none of the defendants have ever raised any funds for the building of a railroad along said line, nor has any such railroad ever been built. In this action to recover the cost of making the survey plaintiff sought to show a subsequent oral contract by which defendants were obligated to pay therefor in any event. This evidence was stricken out on the ground that "the testimony does not only fail to explain or tend to show a collateral agreement, but it absolutely contradicts that proposition."

Alfred G. Reeves and William P. Dalton for appellant.

Frederick J. Moses for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, CARDOZO and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

ASHER AYERS, as Executor of VIRGINIA EDWARDS, Deceased, Appellant, *v.* JAMES R. WILLISTON et al., Respondents.

Ayers v. Williston, 156 App. Div. 989, affirmed.
(Argued May 22, 1917; decided June 5, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered November 15, 1913, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The complaint alleged that plaintiff employed defendants to act as her brokers in the purchase and sale of stocks upon margin and contains two causes of action. In the first cause of action it is alleged that defendants purchased stocks for plaintiff's account and thereafter converted the same to their own use. The second cause of action alleged that plaintiff employed defendants to sell stocks "short" for her account; that the defendants agreed to make deliveries on account of such short sales by borrowing stocks for that purpose; that plaintiff secured defendants against loss by a margin deposit; that defendants did not borrow said stocks and sustained no losses; that defendants claimed to have sustained losses and appropriated plaintiff's margin. The answer admitted that on the date set forth in the complaint the "plaintiff opened an ordinary stock trading account with these defendants," deposited margin and thereafter gave various orders to buy and sell stocks, all of which orders were duly executed and notice thereof given to and accepted by plaintiff. The answer further alleged an account stated and finally denied all allegations in the complaint not expressly admitted.

W. H. Hamilton, David B. Simpson and Charles W. Zaring for appellant.

Walter F. Taylor and Edwin De T. Bechtel for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN and ANDREWS, JJ. Not sitting: CARDOZO and McLAUGHLIN, JJ.

CROCKER-WHEELER COMPANY, Respondent, v. GENESEE RECREATION COMPANY, Appellant.

Crocker-Wheeler Co. v. Genesee Recreation Co., 162 App. Div. 934, modified.

(Argued May 24, 1917; decided June 5, 1917.)

APPEAL from a judgment entered April 7, 1914, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial and reinstated said verdict. The relief sought was the recovery of three generators sold on conditional sales contract by plaintiff to the James McDonnell Company and subsequently transferred to the defendant. Defendant's amended answer set up as a defense that plaintiff failed to file its conditional sales contract; that the defendant was a *bona fide* purchaser for value without notice; that the generators became a part of the realty subject to the lien of a mortgage which at the time existed upon the premises and that by foreclosure of the mortgage and a sale thereunder and subsequent sales the real estate and the generators passed to the defendant.

Percival D. Oviatt for appellant.

Isaac Adler for respondent.

Judgment modified by deducting therefrom interest on \$1,328 from December 25, 1907, to December 20, 1909, and as so modified affirmed, without costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, CARDENZO, McLAUGHLIN, CRANE and ANDREWS, JJ.

IRVING L. SPAVEN, Appellant, v. THE M. A. TALBOT COMPANY, Respondent.

Spaven v. Talbot Co., 162 App. Div. 926, affirmed.

(Argued May 23, 1917; decided June 12, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 8, 1914, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant, his employer. The complaint alleged that plaintiff, while in the employ of defendant as a carpenter, met with an accident and received certain injuries, and that at the time of said accident the plaintiff was exercising due care and diligence; that the said injuries were caused by reason of a defect in the condition of the ways, works and plant of the defendant, by reason of the fact that the defendant did not provide a reasonably safe place in which to work, and by reason of the fact that the defendant did not provide sufficient rules. The answer admits that the plaintiff was at work for the defendant and received certain injuries, but denied that the said accident or injuries were received in the manner, to the extent or under the circumstances set forth in said complaint, and denied every other allegation contained in said complaint, and sets forth the defense of contributory negligence and that of assumed risk and the negligence of a fellow-servant.

W. E. Scripture for appellant.

Edward Schoeneck for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, CARDOZO,
MC LAUGHLIN, CRANE and ANDREWS, JJ.

SAMUEL SHOIRO, Respondent, v. SAMUEL N. BERLIN et al., Appellants.

Shopiro v. Berlin, 167 App. Div. 951, affirmed.
(Argued May 28, 1917; decided June 12, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 8, 1915, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover the sum of \$6,000 with interest from September 15, 1913, upon a bond executed by the defendants to one Jacob Lourie, which came into the possession of the plaintiff through a number of mesne assignments. The defense was usury, it being claimed by the defendants that the transaction whereby the plaintiff came into possession of the bond in suit was really a loan of \$20,000 directly from the plaintiff to the defendants, and for which loan the plaintiff exacted a usurious bonus of \$3,350.

Charles Trosk and Henry Fluegelman for appellants.

T. Aaron Levy for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, CARDENZO,
McLAUGHLIN and CRANE, JJ. Not sitting: ANDREWS, J.

**ROBERT MIELE, Respondent, v. SALEM ROSENBLATT et al.,
Appellants.**

Miele v. Rosenblatt, 164 App. Div. 604, affirmed.
(Argued May 28, 1917; decided June 12, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 4, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by

plaintiff through the negligence of the defendants, his employers. The plaintiff was injured while sharpening a small steel drill. The sharpening was done by repeatedly heating and hammering the cutting end of the drill. When sufficiently heated the drill was hammered out on a small slab of steel resting on the end of a bench or table supporting a lathe operated by artificial power and vibrating from the effect thereof. To enable him to hold and manipulate the drill plaintiff was furnished with a pair of ordinary gas pliers alleged to have been more or less defective from use. While plaintiff was beating the drill it escaped from the pliers, and flying into his right eye destroyed the sight.

E. Clyde Sherwood and Amos H. Stephens for appellants.

Bernard Gordon for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, CARDENZO, CRANE and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

CHARLES O. SWANSON, Respondent, *v.* THE VON HOVELING AMERICAN COMPOSITION COMPANY, Appellant.

Swanson v. Von Hoveling Am. Composition Co., 166 App. Div. 900, affirmed.

(Argued May 24, 1917; decided June 12, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 4, 1915, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant, his employer. Defendant was engaged in painting certain large oil tanks which had just been placed in four holds of the steamship *Horley* lying at the Robins dry dock,

Brooklyn. The steamship was being converted into a tank ship. Plaintiff was a painter in the employ of the defendant, and on the day in question was painting one of the large tanks, about twenty-five feet high, located in No. 2 hold, and while so engaged was standing upon a swinging scaffold, which was hanging near the top of the tank and suspended by ropes at both ends. Plaintiff had been working upon this scaffold for about a half hour when the scaffold broke and fell, whereupon the plaintiff was precipitated to the bottom of the hold. The cause of action arises out of the alleged violation upon the part of the defendant of its statutory duty to provide its employees a safe and suitable scaffold as required by sections 18 and 19 of the Labor Law. The defendant did not construct or place the scaffold; it had been constructed and used by the ironworkers in building the tanks; but it is claimed on behalf of the plaintiff that the defendant adopted the scaffold for the use of its painters, and so was responsible to them for its safety.

Bertrand L. Pettigrew and Walter L. Glenney for appellant.

Frederick S. Martyn for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, CARDOZO,
MC LAUGHLIN and ANDREWS, JJ. Not sitting: CRANE, J.

GUSTAV H. POPPENBERG, Appellant, *v.* R. M. OWEN AND COMPANY, Respondent.

Poppenberg v. Owen & Co., 165 App. Div. 946, affirmed.

(Argued May 24, 1917; decided June 12, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 19, 1914, affirming a judgment in favor of defendant entered upon a verdict. This action was

brought to recover upon certain written contracts in and by the terms of which the plaintiff was given the exclusive right to sell certain motor cars known as the Reo cars of various styles within a portion of the state of New York. The defendant claimed damages by way of counterclaim for failure on the part of the plaintiff to take all of the cars alleged to have been purchased in the contracts.

Adelbert Moot and Frank Gibbons for appellant.

Hamilton Ward and Irving W. Cole for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, CARDENZO,
MC LAUGHLIN, CRANE and ANDREWS, JJ.

BENZ AUTO IMPORT COMPANY OF AMERICA, Appellant, v.
JESSE FROEHLICH, Respondent.

Benz Auto Import Co. v. Froehlich, 162 App. Div. 907, affirmed.
(Submitted May 25, 1917; decided June 12, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 27, 1914, affirming a judgment in favor of defendant entered upon a verdict. The complaint alleged that the defendant with two others offered to transfer to the plaintiff the assets of a dissolved corporation and accept in payment thereof \$55,000 in fully paid capital stock of the plaintiff corporation. That the proposition was accepted and 550 shares of the stock of the plaintiff was directed to be issued in payment. That the stock was never issued but that thereafter 1,000 shares were issued to the defendant and the two others. That 550 shares of the 1,000 so issued were fully paid for by the transfer of the assets, and that 450 shares of the stock issued were not covered by the assets purchased, and were never paid for in whole or in part. That the defendant

agreed to pay full par value, viz., \$22,500, for 225 shares of the stock, and agreed to make such payment to the plaintiff immediately after the issuing of the 225 shares of stock. That plaintiff has demanded the said sum, and that the sum of \$22,500 is wholly due and owing from the defendant to the plaintiff, and no part has been paid. The answer raised the issue, viz.: Were the 450 shares issued for property and did the defendant promise and agree to pay \$22,500 for 225 shares, and make such payment immediately after the issue of said stock to defendant?

Charles Oakes for appellant.

Jesse S. Epstein for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, CARDENZO, CRANE and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

JOSEPH NEUSTADT, Respondent, *v.* JAMAICA ESTATES et al., Defendants, and EDWARD E. DEAN et al., Appellants.

Neustadt v. Jamaica Estates, 168 App. Div. 957, appeal dismissed.
(Argued June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 6, 1915, upon an order affirming an order of Special Term denying a motion to set aside a sale in partition.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

Edward M. Grout for motion.

Edward E. Dean opposed.

Motion granted and appeal dismissed, without costs.

ANNETTE E. S. FLEISCHER, Respondent, v. ERNST A. FLEISCHER, Appellant.

Fleischer v. Fleischer, 177 App. Div. 934, appeal dismissed.
(Argued June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 9, 1917, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for a separation.

The motion was made upon the ground that the exceptions were frivolous; that no questions of law were involved; that the affirmance was unanimous and that the Court of Appeals has no jurisdiction to review the appeal.

Israel H. Perskin for motion.

James A. Blanchfield opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

BENJAMIN JAFFE, Appellant, v. JOHN A. SONNTAG, Respondent.

(Submitted June 4, 1917; decided June 12, 1917.)

MOTION for leave to apply to the Appellate Division for re-settlement of order appealed from.

Abraham I. Spiro for motion.

Jacob R. Schiff opposed.

Per Curiam. The appellant moves that he be permitted to apply to the Appellate Division to re-settle an order made by that court so that it may recite the particular questions of fact upon which the decision was made. The appeal in this court has not yet been heard. An application for re-settlement already made to the Appellate Division was denied in the following memorandum: "The motion to re-settle is denied, an appeal having

been taken to the Court of Appeals, that court having recently held that this court has no power to re-settle an order after appeal without leave of that court."

We do not question the power of the Appellate Division to re-settle its order in such circumstances without leave from us. It is a power repeatedly exercised in practice and repeatedly recognized in our decisions (*Birnbaum v. May*, 170 N. Y. 314; *Health Department, N. Y. v. Dassori*, 159 N. Y. 245). We have questioned the power to change an order when we had already reviewed it and the remittitur on our decision had been filed in the court below (*Matter of Craig*, 218 N. Y. 729), but that is not this case.

The motion is, therefore, denied, without costs, on the ground that the permission asked for is unnecessary.

CHASE, COLLIN, CARDZOZO, POUND, McLAUGHLIN and CRANE, JJ., concur.

Motion denied.

CHARLOTTE EPPS, Appellant, *v.* MAY PRICE et al., Respondents.

Epps v. Price, 175 App. Div. 955, appeal dismissed.

(Argued June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered February 2, 1917, affirming a judgment in favor of defendants entered upon a verdict in an action to have adjudged invalid the will of Julia Makley, deceased.

The motion was made upon the ground that the affirmation by the Appellate Division was unanimous and that permission to appeal had not been obtained.

N. P. Willis for motion.

G. L. Bockes opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

In the Matter of the Application for the Sale of Real Property Devised by CORNELIUS CALLAHAN, Deceased.

EDITH M. SMITH, Appellant; JOHN E. KELLEY, Respondent.

(Submitted June 4, 1917; decided June 12, 1917.)

Motion for re-argument denied, with ten dollars costs.
(See 220 N. Y. 774.)

In the Matter of the Claim of WILLIAM COBB, Respondent, against LIBRARY BUREAU et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Cobb v. Library Bureau, 178 App. Div. 91, appeal dismissed.
(Argued June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 29, 1916, affirming an award under the Workmen's Compensation Law.

The motion was made upon the ground that the notice of appeal was not served within the required time.

Clarence E. Aiken for motion.

William H. Foster opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

In the Matter of the Claim of ADOLPH LANDES against DAVID LUPTON et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Landes v. Lupton's Sons Co., 178 App. Div. 989, appeal dismissed.
(Argued June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1916, affirming an award under the Workmen's Compensation Law. .

The motion was made upon the ground that the notice of appeal had not been served within the required time.

Clarence E. Aiken for motion.

William H. Foster opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

FLORENCE V. BENOLIEL, Respondent, v. ABRAHAM BENOLIEL et al., Appellants.

Benoliel v. Benoliel, 178 App. Div. 918, appeal dismissed.

(Submitted June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 4, 1917, which affirmed an order of Special Term granting a motion for judgment on the pleadings in an action for the admeasurement of dower.

The motion was made upon the ground that the order of affirmance was unanimous; that permission to appeal had not been obtained, and that appellant had failed to file the required undertaking.

Paul Gross for motion.

Leon Laski opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

JOSEPH D. BAUCUS, Appellant, v. ERNEST H. B. WEATHERALL, Respondent.

Baucus v. Weatherall, 176 App. Div. 914, appeal dismissed.

(Submitted June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first

judicial department, entered January 19, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to dissolve an alleged partnership and for an accounting.

The motion was made upon the ground that the affirmation was unanimous, and that the exceptions were frivolous and presented no questions of law for review.

F. Sidney Williams for motion.

John Ewen opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

**LAWRENCE F. DALTON, by JOHN W. DALTON, His
Guardian ad Litem, Respondent, v. F. EDWIN PARKER,
Appellant.**

Dalton v. Parker, 176 App. Div. 897, appeal dismissed.
(Submitted June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 23, 1916, which affirmed an order of Special Term denying a motion to vacate a judgment.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

James F. Quigley for motion.

Frank M. Leary opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

WILLIAM P. BEMENT et al., as Executors of HENRY VAN BEIL, Deceased, Appellants, v. AETNA LIFE INSURANCE COMPANY et al., Respondents.

Bement v. Aetna Life Ins. Co., 177 App. Div. 890, appeal dismissed.

(Argued June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 27, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action for the reformation of a policy of life insurance.

The motion was made upon the ground that the affirmance by the Appellate Division was unanimous and that no questions of law were involved.

Frederick H. Kellogg and Keyes Winter for motion.

Leon M. Prince opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

HAAS TOBACCO COMPANY, Appellant, v. AMERICAN FIDELITY COMPANY, Respondent.

Reported below, 178 App. Div. 267.

(Submitted June 4, 1917; decided June 12, 1917.)

MOTION to dismiss an appeal from a judgment entered May 17, 1917, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action upon a policy of liability insurance.

The motion was made upon the ground that there was no basis in law for submission to the jury of the questions involved.

Charles Newton for motion.

Henry W. Killeen opposed.

Motion denied, with ten dollars costs.

KLINE BROS. & Co., Appellant, v. THE HANOVER FIRE INSURANCE COMPANY OF THE CITY OF NEW YORK, Respondent.

(Submitted June 4, 1917; decided June 12, 1917.)

Motion for re-argument denied, with ten dollars costs.
(See 220 N. Y. 750.)

JAMES J. CROZIER et al., Appellants, v. JAMES F. RICHARDSON et al., Respondents.

Reported below, 178 App. Div. 927.

(Argued June 4, 1917; decided June 12, 1917.)

MOTION to dismiss as to respondent Richardson an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 18, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term in a taxpayers' action.

The motion was made upon the grounds that the affirmance by the Appellate Division was unanimous, and that the exceptions were frivolous.

Motion denied, with ten dollars costs.

GEORGE GABEL, Respondent, v. HASTINGS HOMES COMPANY, Appellant.

Gabel v. Hastings Homes Co., 167 App. Div. 912, affirmed.

(Argued May 25, 1917; decided June 15, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department,

entered February 15, 1915, affirming a judgment in favor of plaintiff entered upon an order of the court at Special Term granting a motion for judgment on the pleadings. This action was originally brought to procure the specific performance of a real estate contract, but when the time of final hearing arrived, it appeared that the defendant could not make title in accordance with the contract. The plaintiff by means of an amended supplemental complaint set out these facts, and demanded judgment for the amount of purchase money paid with interest. The answer alleged that the plaintiff originally commenced this action for specific performance; that at the time of the commencement of the action the plaintiff knew that the defendant could not convey the property free from incumbrances, because the plaintiff knew at the time of the commencement of the action that the premises were incumbered by the easement described in the complaint; that the amended supplemental complaint was served, and that in such amended supplemental complaint the plaintiff demanded judgment adjudging that he have a lien upon the premises described in the contract for the amount of payments made by him, with interest; and that the plaintiff, by commencing his suit for specific performance, destroyed his right of action to recover the purchase money.

Richard Krause and Clarence G. Galston for appellant.

George H. Taylor, Jr., and Smith Williamson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, CARDOZO,
McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM B. OSTERHOUT, Appellant, *v.* WILLIAM WILLIAMS, as Commissioner of Water Supply, Gas and Electricity of the City of New York, Respondent.

People ex rel. Osterhout v. Williams, 173 App. Div. 981, affirmed.
(Submitted June 4, 1917; decided June 15, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 12, 1916, which affirmed an order of Special Term denying a motion for a writ of mandamus to compel defendant to reinstate the relator in the position of assistant engineer. The relator, an exempt volunteer fireman, was suspended and his name sent to the municipal civil service commission to be placed upon the preferred list, to take effect January 1, 1915. Such suspension, together with that of a large number of other assistant engineers, and other members of the engineering force of the department of water supply, was due to lack of work and the failure of the board of estimate and apportionment and the board of aldermen to make appropriations for construction work in the department of water supply, and to make an appropriation for the relator's salary for the year 1915. Relator claimed that others who were not veterans were retained in positions similar to his, and that he should have been transferred to one of such positions.

Joseph M. Proskauer and Burgess Osterhout for appellant.

Lamar Hardy, Corporation Counsel (Terence Farley and Elliot S. Benedict of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN and CRANE, JJ.

SPIRITSFABRIEK ASTRA OF AMSTERDAM, HOLLAND,
Respondent, v. SUGAR PRODUCTS COMPANY, Appellant.

Spiritusfabriek Astra of Amsterdam, Holland, v. Sugar Products Co., 176 App. Div. 829, affirmed.

(Argued June 4, 1917; decided June 15, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 23, 1917, which affirmed an order of Special Term denying a motion, by defendant, for judgment on the pleadings. This action is brought to recover damages for the breach of a written contract by which plaintiff agreed to buy from defendant and defendant agreed to sell to plaintiff, for a specified price, from 6,000 to 12,000 tons of San Domingo or Cuban molasses yearly for a term of three years from July 1, 1914, "buyer's option in both instances." The defendant moved for judgment on the grounds that the alleged agreement contained on its face a stipulation to agree in the future on an essential term, viz., time of delivery, and that it was, therefore, not a contract; that the alleged agreement was vague and uncertain in other respects to such an extent as to render it unenforceable; that the complaint failed to allege a demand for delivery of the molasses within a reasonable time, and that the complaint failed to allege plaintiff's ability to pay for the molasses alleged to have been contracted to be delivered.

The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

Joseph M. Proskauer and Clarence M. Lewis for appellant.

Hiram Thomas and Henry H. Abbott for respondent.

Order affirmed, with costs, and question certified answered in the affirmative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN and CRANE, JJ.

In the Matter of the Application of THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE REA, Respondent, v. WILLIAM A. PRENDERGAST, as Comptroller of the City of New York, Appellant.

People ex rel. Rea v. Prendergast, 178 App. Div. 930, affirmed.
(Submitted June 4, 1917; decided June 15, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 11, 1917, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to audit certain bills for stenographic services rendered by the petitioner on the trial of the case of People against Grout in the County Court of Kings county. The trial was an exceedingly lengthy one, and during the course of it the judge who presided, acting under section 300 of the Judiciary Law, directed the petitioner herein to furnish him each day with a typewritten transcript of his notes, of the testimony, etc., of the preceding day. The principal questions involved were two in number: (1) May the judge who is presiding at the trial of a criminal cause make a certificate, under section 456 of the Code of Criminal Procedure, that the bill of a stenographer, who furnishes a copy of the minutes for the use of the county clerk, is fair and reasonable and a county charge, and thus preclude the comptroller from auditing the claim; and (2) may he also make such a certificate, under section 303 of the Judiciary Law, for a copy which is furnished to himself.

Lamar Hardy, Corporation Counsel (Terence Farley and William E. C. Mayer of counsel), for appellant.

Hunter L. Delatour and Meier Steinbrink for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDENZO, POUND, McLAUGHLIN and CRANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MANHATTAN AND QUEENS TRACTION CORPORATION, Appellant,
v. STATE BOARD OF TAX COMMISSIONERS, Respondent.

THE CITY OF NEW YORK, Intervening, Respondent.

People ex rel. Manhattan & Queens Traction Co. v. State Board of Tax Comrs., 175 App. Div. 929, affirmed.

(Argued June 4, 1917; decided June 15, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 3, 1916, which affirmed an order of Special Term confirming the proceedings of the defendant in assessing a special franchise tax against the relator. The special franchise of the relator assessed by the state board of tax commissioners consisted of its franchise, right, authority or permission to construct, maintain and operate its street railroad in the various streets and highways in the borough of Queens, and also the tangible property, to wit, the railroad tracks and appurtenances situated in such streets and highways. The relator claimed that the assessment should be canceled upon the ground of illegality, and contended that the tangible property, to wit, the tracks, wires, etc., constructed, used and operated by it in connection with its special franchise and included in the assessment was, and at all times from the date of the construction of the tracks, had been the property of the city of New York and, therefore, exempt from taxation.

Joseph Rowan and Henry J. Curtis for appellant.

Merton E. Lewis, Attorney-General (Leonard J. Obermeier of counsel), for State Board of Tax Commissioners, respondent.

Lamar Hardy, Corporation Counsel (William H. King and Addison B. Scoville of counsel), for City of New York, respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZ, POUND, McLAUGHLIN and CRANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK, WESTCHESTER AND BOSTON RAILWAY COMPANY, Appellant, v. LAWSON PURDY et al., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

People ex rel. N. Y., W. & B. Ry. Co. v. Purdy, 177 App. Div. 918, affirmed.

(Submitted June 4, 1917; decided June 15, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 30, 1917, which affirmed an order of Special Term reducing and confirming as reduced an assessment for purpose of taxation upon railroad bridges of the relator. The assessment was made on the theory that each of said bridges was a part of the real estate of the relator assessable by officials of the city of New York having jurisdiction in the premises. The relator alleged that each of said bridges was a part of the crossing of the relator over the street or avenue in question and, therefore, a part of the special franchise of the relator in the city of New York, and that the assessment thereof was, therefore, solely within the jurisdiction of the state board of tax commissioners, and outside the jurisdiction of the respondents. Defendants claim that where the legal opening of the street preceded the consent to cross there is a special franchise; where it did not, there is no special franchise.

George S. Graham and Ralph P. Buell for appellant.

Lamar Hardy, Corporation Counsel (William H. King and Addison B. Scoville of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN and CRANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CITY INVESTING COMPANY, Appellant, v. MARTIN SAXE et al., as State Tax Commissioners, Respondents.

People ex rel. City Investing Co. v. Saxe, 177 App. Div. 16, affirmed.

(Argued June 4, 1917; decided June 15, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 12, 1917, which confirmed, on certiorari, a determination of the state tax commission refusing to revise or readjust the franchise tax assessed against the relator for the year ending October 31, 1915. The relator complains of the determination of the tax department in fixing a tax upon the common stock at a valuation at par, maintaining that the average market value of the common stock determined by the examination of sales during the year furnishes the only test of actual value of the stock.

Edward F. Clark for appellant.

Merton E. Lewis, Attorney-General (Harold J. Hinman of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZ, POUND, McLAUGHLIN and CRANE, JJ.

In the Matter of the Application of WILLIAM J. REED, Respondent, for Permission to Sell Real Estate to Pay Debts of HENRY M. BAILEY, Deceased.

FRANCES H. STODDARD, as Administratrix, et al., Appellants.

Appellate Division may not base a finding upon the conclusion that if proper evidence had been received it would have been incredible because in the judgment of the court the witnesses were discredited by the history of the case and their conduct in it.

1. The Appellate Division cannot base a finding upon no evidence, but upon its conclusion that if proper evidence on a plain question of fact had been received it would have been incredible.

2. It is reversible error for that court in order to cure an error and sustain a decree of a surrogate, to find that if competent evidence offered by appellant had been received the witnesses were discredited by the history of the case and their conduct in it, and the evidence offered could not have changed the result.

Matter of Reed, 177 App. Div. 76, reversed; 178 App. Div. 942, appeal dismissed.

(Argued June 8, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 21, 1917, which affirmed a decree of the Warren County Surrogate's Court directing the sale of real estate of Henry M. Bailey, deceased, for the payment of his debts. Also appeal from an order of said Appellate Division entered May 8, 1917, which affirmed an order of the Warren County Surrogate's Court denying a motion for additional security for costs.

Charles H. Stoddard for appellants.

Beecher S. Clother for respondent.

POUND, J. This proceeding is here for the fourth time. We sent it back once because no citation to creditors generally had been issued (214 N. Y. 383), and again because the citation was published without obtaining an order of publication (218 N. Y. 711).

We said (219 N. Y. 543) in denying a motion for re-argument on the second appeal that "Nothing in our decision concludes the appellant Blanche T. Bechoff from proving that a deed had been delivered to her, and thereby making herself a party to the proceeding."

When the matter came before the surrogate after our decision he refused to receive in evidence the deed offered on the part of the appellant Blanche T. Bechoff or the evidence to the effect that such a deed had been delivered to her prior to the filing of the petition herein and refused to make her a party to the proceeding, and the Appellate Division has found, in order to cure this error and sustain the decree of the surrogate:

"* * * as a matter of fact that the alleged deed to

Mrs. Bechoff was made and delivered after the first decree was made by the surrogate, and that her rights under said deed are subject to said decree; that her mother, her father and herself are discredited by the history of the case and their conduct in it, *and if the evidence of father and mother had been received with reference to the deed it could not have changed the result * * *.*"

Such disregard of the rights of appellants under the decision of this court should not pass unnoticed. It has never been held that because competent evidence may be found unworthy of belief it may be excluded from the consideration of the trier of fact. It has never been held that the Appellate Division may base a finding upon no evidence but upon its conclusion that if proper evidence on a plain question of fact had been received it would have been incredible. If competent evidence of qualified witnesses may be excluded because in the judgment of the court it would be a waste of time to hear it, proceedings may be disposed of arbitrarily. This is not a proper field for the enlargement of the court's discretion. The proceeding has been conducted by the petitioner with almost marvelous disregard of the plain provisions of the Code of Civil Procedure and the determinations of this court. The amount involved is small and the proceeding should be brought to a conclusion, but we cannot affirm without affording a troublesome precedent. If the surrogate had passed adversely to the claim of the appellant Blanche T. Bechoff after receiving the evidence of the delivery of the deed, that would have put an end to the litigation. If she had been allowed to come in and defend the proceeding she might or might not have been successful. But, on the objections and motions of petitioner's counsel, the surrogate, with ample opportunity to dispose of the proceeding on the facts, refused to hear the evidence. We cannot adopt the summary disposition of the matter by the Appellate Division as satisfactory.

The order affirming decree should be reversed and the proceeding remitted to the surrogate for a hearing *de*

novo of the allegations and proofs of the parties and of the application of Blanche T. Bechoff to be allowed to come in and defend the proceeding, with costs of this appeal in this court and in the Appellate Division to the appellants against the respondent.

The order denying appellants' application to compel petitioner to file an additional undertaking as security for costs is not appealable to this court without permission (Code Civ. Pro. § 190, subd. 2), and the appeal therefrom should be dismissed, with costs.

CHASE, COLLIN, CARDZOZO, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Order reversed, etc.

In the Matter of the Claim of FANNIE A. UHL, Respondent, against THE HARTWOOD CLUB et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Workmen's Compensation Law - forestry and logging for pecuniary gain.

Where the owner of a large tract of woodland cuts and sells the lumber upon it regularly, although that work may be incidental to his main business, he is engaged in forestry and logging for pecuniary gain within the definition of the Workmen's Compensation Law.

Uhl v. Hartwood Club, 177 App. Div. 41, affirmed.

(Argued June 8, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 16, 1917, affirming an award of the state industrial commission under the Workmen's Compensation Law.

William H. Foster and James B. Henney for appellants.

Merton E. Lewis, Attorney-General (E. C. Aiken of counsel), for respondent.

Per Curiam. The commission has found that the appellant was engaged in the operation of a country club and in connection therewith in the business of ice harvesting, forestry and logging; that it conducted this business for pecuniary gain; that Uhl was at the time of his death employed by it as a lumberman and while so employed was killed.

We think there was ample evidence to support these findings.

Whether a club or an individual owning a tract of woodland is or is not engaged in forestry and logging for pecuniary gain is a question of degree. It could not be said that the owner of a city lot who cut a tree and sold the timber was so engaged. Nor where a farmer here and there felled trees on his farm. But where the owner of a large tract of woodland cuts and sells the lumber upon it regularly, although that work may be incidental to his main business, he comes within the definition of the statute.

The order appealed from should be affirmed, with costs.

CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Order affirmed.

GATELY-HAIRE COMPANY, INCORPORATED, Respondent,
v. THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, PHILADELPHIA, Appellant.

Gately-Haire Co., Inc., v. Insurance Co. of the State of Pennsylvania, Philadelphia, 176 App. Div. 921, reversed.

(Argued April 17, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 5, 1917, modifying and affirming as modified a judgment in favor of plaintiff entered upon an

order of Special Term granting a motion by plaintiff for judgment in its favor upon the pleadings in an action upon a policy of fire insurance. The defense was that the policy sued upon had been canceled by plaintiff's request in writing to defendant received before the fire.

Ralph W. Gwinn for appellant.

Franklin M. Danaher for respondent.

Judgment of Appellate Division and Special Term reversed and complaint dismissed, with costs in all courts on opinions of HOGAN and McLAUGHLIN, JJ., in *Gately-Haire Co. v. Niagara Fire Ins. Co.* (221 N. Y. 162.)

Concur: HISCOCK, Ch. J., CHASE, HOGAN, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HYMAN FISH, Appellant, *v.* ALFRED SMITH, as Sheriff of the County of New York, Defendant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent.

People ex rel. Fish v. Smith, 177 App. Div. 152, affirmed.
(Argued April 26, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 9, 1917, which reversed an order of the court at a Trial Term sustaining a writ of habeas corpus and dismissing an indictment against the relator, dismissed said writ, reinstated the indictment and remanded the relator to custody. The relator was indicted, tried and convicted, but on appeal the judgment of conviction was reversed and the indictment dismissed. He was thereafter again indicted upon the same state of facts and arrested. He thereupon sued out a writ of habeas corpus alleging former jeopardy. The question was as to

whether the crime charged in the second indictment was the same as that charged by the first.

William Travers Jerome for appellant.

Edward Swann, District Attorney (Robert C. Taylor of counsel), for respondent.

Order affirmed; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDENZO, McLAUGHLIN, CRANE and ANDREWS, JJ. Not voting: CHASE, J.

**FRED E. BRADLEY, Respondent, v. VILLAGE OF UNION,
Appellant.**

Bradley v. Village of Union, 164 App. Div. 565, affirmed.
(Argued May 18, 1917; decided July 11, 1917.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 7, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for an alleged breach of contract in failing to supply the plaintiff with water. The village of Union in the year 1908 took the necessary steps to purchase the water plant theretofore maintained and operated by the Union Water Company, and the transaction was fully and lawfully consummated. Several years prior to this purchase by the defendant the Union Water Company had entered into a contract by the terms of which it supplied water to several families just outside of the corporate limits of the village of Union, in the town of Union. To accomplish this, the Union Water Company had extended its mains by adding several hundred feet of one-inch pipe to its four-inch main. A portion of the one-inch main was within the village limits and a portion of it outside, and the plaintiff purchased his property outside of the village limits from one of the parties

who had thus been supplied with water through the Union Water Company's extended main. The plaintiff, after his purchase, continued to be supplied with water from the Union Water Company, and afterward from the village of Union, which purchased all the property belonging to the Union Water Company. The defendant contended that the one-inch extension of the four-inch main was a service pipe, and that it did not belong to the defendant to maintain and operate the same, or at least that it owed no such duty to the plaintiff outside the village limits.

Augustus Babcock and *Thomas A. MacClary* for appellant.

La Verne E. Race for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, CRANE and ANDREWS, JJ.

GEORGE H. SMITH, et al., Respondents, v. CORDEN T. GRAHAM, Appellant.

(Reargued May 21, 1917; decided July 11, 1917.)
(See 217 N. Y. 655; 221 N. Y. 498.)

Remittitur amended so as to provide and read: Judgment modified by permitting defendant, at his election, to remodel the addition erected by him upon the premises described in the deed Smith to Graham, dated August 9, 1899, for use as a dwelling in accordance with and as defined in the restrictive covenants contained in said deed, instead of removing said building from said premises and that as so modified said judgment be affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, CARDOZO, McLAUGHLIN and ANDREWS, JJ.

THE C. H. VENNER COMPANY, Appellant, v. SOUTHERN RAILWAY COMPANY, Respondent.

Venner Co. v. Southern Ry. Co., 175 App. Div. 974, affirmed.
(Argued June 5, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 5, 1916, affirming a judgment in favor of defendant entered upon an order of Special Term granting a motion by defendant for judgment on the pleadings and directing a dismissal of the complaint in an action for money had and received. The answer set up as a defense that the plaintiff is a corporation of the state of New Jersey and a non-resident of New York, and the defendant a corporation of the state of Virginia and a non-resident of New York; that the cause of action does not involve the title to or possession of real property within the state of New York, and accrued in favor of the plaintiff not later than June 27, 1907; that prior to and at the time of the commencement of the action there were in force certain statutes of the state of Virginia which provided that certain actions therein specified should be brought within five years, and certain other actions therein specified within three years, after the right to bring the same should have first accrued; that the cause of action alleged in the complaint did not accrue within three years, nor within five years, prior to the commencement of this action, and that at the time of the commencement of this action the alleged cause of action was barred of enforcement by the statutes of Virginia, the state of residence of the defendant.

Elijah N. Zoline and William A. Ulman for appellant.

Francis Lynde Stetson and George H. Gardiner for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, HOGAN, CARDOZO, POUND and McLAUGHLIN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MATTIE DAWSON et al., Respondents, v. EDWIN DUFFEY, as State Commissioner of Highways, Appellant.

People ex rel. Dawson v. Duffey, 177 App. Div. 949, affirmed.
(Argued June 5, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 23, 1917, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the state commissioner of highways to take proceedings to acquire by condemnation the rights and easements of the relators in the highway known as East Main street or state road No. 6 in the town of Batavia, Genesee county, N. Y., necessary and required for the purpose of carrying out the provisions of sections 90, 91 and 92 of the Railroad Law in connection with the change or abolishment of the crossing at grade of said East Main street or state road No. 6 over the New York Central railroad tracks.

Merton E. Lewis, Attorney-General (*Edward C. Griffin* of counsel) for appellant.

Frank W. Williams for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDENZO, POUND, McLAUGHLIN and CRANE, JJ.

In the Matter of the Application of the CITY OF NEW YORK, Respondent, Relative to Acquiring Title to Lands Required for Opening and Extending Rosedale Avenue, Commonwealth Avenue and St. Lawrence Avenue.

WILLIAM WALDORF ASTOR, Appellant; WILLIAM H. FIELD et al., Respondents.

Matter of City of New York (Rosedale Ave.), 175 App. Div. 864, appeal dismissed.

(Argued June 5, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 18, 1917, which affirmed an order of Special Term confirming the report of commissioners of estimate as to awards for damages due to the intended regulation of two of the streets title to which was acquired by the city of New York in the above-entitled proceeding, viz., Rosedale avenue and Commonwealth avenue, in the borough of The Bronx. None of the intended regulation awards was made to appellant. Appellant, however, owns lands, included within the area of assessment for benefit adopted by the board of estimate and apportionment, within which area a portion of the sums so awarded will be assessed. The question which he sought to present was that those awards were illegal for the reason that the proposed grades on account of which the awards were made never received the approval of the board of railroad commissioners pursuant to former section 61 of the Railroad Law.

Thomas C. Blake for appellant.

Lamar Hardy, Corporation Counsel (Joel J. Squier and John J. Kearney of counsel), for city of New York, respondent.

Lawrence E. French, Thomas W. Henry, Benjamin Trapnell and James H. Goggin for William H. Field et al., respondents.

Appeal dismissed, with costs, on the ground that the order appealed from is not a final order as to the appellant; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, POUND and CRANE, JJ. Not sitting: McLAUGHLIN, J.

In the Matter of the Application of THE CITY OF NEW YORK, Respondent, Relative to Acquiring Title to Lands Required for Widening Whitlock Avenue.

JOHN B. SIMPSON, JR., as Executor and Trustee under the Will of WILLIAM SIMPSON, Deceased, Appellant.

Matter of City of New York (Whitlock Ave.), 178 App. Div. 896, appeal dismissed.

(Argued June 5, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 27, 1917, which affirmed an order of Special Term denying a motion to set aside the above-entitled proceeding.

Truman H. Baldwin and Ralph L. Baldwin for appellant.

Lamar Hardy, Corporation Counsel (Joel J. Squier and John J. Kearney of counsel), for respondent.

Appeal dismissed upon the ground that it is from an intermediate and not a final order; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN and CRANE, JJ.

In the Matter of the Application of THE CITY OF NEW YORK, Respondent, Relative to Acquiring Title to Lands Required for Widening Whitlock Avenue.

JOHN B. SIMPSON, JR., as Executor of and Trustee under the Will of WILLIAM SIMPSON, Deceased, Appellant.

Matter of City of New York (Whitlock Ave.), 178 App. Div. 896, affirmed.

(Argued June 5, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 27, 1917, which affirmed an order of Special Term confirming the reports of commissioners of estimate and assessment in the above-entitled proceeding, bringing up for review an order of the said Appellate Division entered April 27, 1917, which affirmed an order of Special Term denying in all respects the motion made by William Simpson, Jr., and John B. Simpson, Jr., as executors of and trustees under the will of William Simpson, deceased, that the above-entitled proceeding and the petitions, resolutions, orders, reports and all other papers and proceedings therein purporting to authorize the said proceedings or upon which the same was founded be set aside, vacated and annulled, and each and every part of said order, as well as the whole thereof, in case the last above-mentioned order of the Appellate Division should be held by the Court of Appeals to be an intermediate and not a final order.

Truman H. Baldwin and Ralph L. Baldwin for appellant.

Lamar Hardy, Corporation Counsel (Joel J. Squier and John J. Kearney of counsel), for respondent.

Order affirmed, with costs to the respondent including the disbursements in the appeal from the intermediate

order. The notice of appeal properly expressed the intention to bring up for review the intermediate order and, therefore, authorized us to consider the contents of the two records submitted; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO,
POUND, McLAUGHLIN and CRANE, JJ.

In the Matter of the Abrogation of Adoption Proceedings
of ELMER F. McDEVITT, an Infant.

KATHLEEN McDEVITT, Appellant; MARY E. McDEVITT,
Respondent.

In the Matter of the Abrogation of Adoption Proceedings
of CATHERINE McDEVITT, an Infant.

KATHLEEN McDEVITT, Appellant; MARY E. McDEVITT,
Respondent.

In the Matter of the Abrogation of Adoption Proceedings
of GEORGE H. McDEVITT, an Infant.

KATHLEEN McDEVITT, Appellant; MARY E. McDEVITT,
Respondent.

Matter of McDevitt, 176 App. Div. 418, affirmed.

(Argued June 5, 1917; decided July 11, 1917.)

APPEAL in each of the above-entitled proceedings from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 19, 1917, which reversed an order of the Kings County Court abrogating, vacating and setting aside a prior order of adoption and restoring custody of the infant to its mother. The adoption was with the mother's consent, and there was no proof of fraud. The foster parent objected to abrogation of the adoption. The Appellate Division reversed the order of abrogation upon the ground that under the Domestic Relations Law the consent of the foster parent was essential, and that the county judge had no power to dispense therewith.

Theodore M. Crisp for appellant.

Hugo Hirsh for respondent.

Orders affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZO,
POUND, McLAUGHLIN and CRANE, JJ.

**NELSON J. PALMER, Respondent, v. DUNKIRK PRINTING
COMPANY, Appellant.**

Palmer v. Dunkirk Printing Co., 176 App. Div. 897, affirmed.
(Argued June 5, 1917; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 6, 1916, which reversed an order of Special Term sustaining demurrers to the complaint and overruled said demurrers in an action for libel. The Appellate Division held that each of the first and sixth causes of action set forth in the complaint states facts from which a jury might find that the defendant accused the plaintiff of the commission of a crime.

The following questions were certified: "1. Are the facts alleged as a first cause of action sufficient to constitute a cause of action? 2. Are the facts alleged as a sixth cause of action sufficient to constitute a cause of action?"

Glenn W. Woodin, Arthur B. Ottaway, William S. Stearns and Joseph C. White for appellant.

Herman J. Westwood for respondent.

Order affirmed, with costs, and questions certified answered in the affirmative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDODOZO, POUND,
McLAUGHLIN and CRANE, JJ. Not voting: COLLIN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN D. IRELAND, Appellant, v. ARTHUR WOODS, as Police Commissioner of the City of New York, Respondent.

People ex rel. Ireland v. Woods, 177 App. Div. 1, affirmed.
(Argued June 6, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 13, 1917, which affirmed an order of Special Term dismissing a writ of habeas corpus and remanding the relator who had been arrested upon the warrant of the governor of this state issued upon the requisition of the governor of New Jersey requesting the arrest of the relator as a fugitive from justice. The petition for the writ of habeas corpus denied that relator was a fugitive from justice, pointed out that the papers accompanying the requisition of the governor of New Jersey failed to show that he was within the limits of the state of New Jersey when the crime whereof he was accused was alleged to have been committed, alleged that it appeared on the face of the indictment accompanying the requisition that no crime under the laws of New Jersey was charged or had been committed, and averred that relator was not within the state of New Jersey at any of the times when the crimes charged in the indictment, or any of them, were committed.

George W. Wickersham, Arthur C. Patterson and Henry Goldstein for appellant.

Edward Swann, District Attorney (Robert S. Johnstone of counsel), for respondent.

Order affirmed; no opinion.

Concur: CHASE, COLLIN, CARDZOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE TOMKINS COVE STONE COMPANY, Appellant, v. MARTIN SAXE et al., as the State Tax Commission, Respondents.

People ex rel. Tomkins Cove Stone Co. v. Saxe, 176 App. Div. 1, affirmed.

(Argued June 6, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 3, 1917, which confirmed a determination of the state tax commission reducing and confirming as reduced a franchise tax against the relator. Exemption was claimed upon the ground that the whole of relator's capital was actually employed in this state in manufacturing and in the sale of the product of such manufacturing. The point at issue was whether the making of road metals and concrete aggregate as carried on by relator was in fact a manufacture.

John De Witt Warner for appellant.

Merton E. Lewis, Attorney-General (James T. Cross of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

JOSHUA SILVERSTEIN, Appellant, v. STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, Respondent.

Silverstein v. Standard Acc. Ins. Co. of Detroit, Mich., 178 App. Div. 891, appeal dismissed.

(Submitted June 6, 1917; decided July 11, 1917.)

APPEAL from a judgment entered April 30, 1917, upon an order of the Appellate Division of the Supreme Court

in the first judicial department which dismissed an appeal from a judgment entered in favor of defendant upon a prior order of said Appellate Division reversing an order of Special Term denying a motion by defendant for judgment in its favor upon the pleadings and granting said motion in an action upon a policy of liability insurance.

Jacob R. Schiff for appellant.

Frank Verner Johnson for respondent.

Appeal dismissed, with costs, on the ground that no undertaking to perfect the appeal had been filed; no opinion.

Concur: CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

ALBERT J. APPELL, Appellant, v. ANNA T. APPELL et al., Respondents, and EMELIA A. SAUER, Appellant, Impleaded with Others.

Appell v. Appell, 177 App. Div. 570, affirmed.

(Argued June 6, 1917; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 5, 1917, which affirmed an order of Special Term granting a motion by defendants, respondents, for judgment in their favor upon the pleadings in an action for partition of real property devised under the will of Jacob Appell, deceased. The testator gave all of his property to his executor and executrix in trust to collect and receive the rents, issues and profits of the real estate and the income of the personal property, and out of the net revenue to pay annuities to his widow and each of his children. Next they were to create out of said net income a so-called sinking fund with which to pay off and discharge the mortgages and other incum-

brances of or upon his real estate or to be used in the improvement of said property. After all the mortgages and incumbrances had been thus paid off the trustees were directed to divide the whole of the net income between testator's widow and children. Plaintiff contended that the will was invalid and that the testator died intestate as to his real property.

The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

Carlisle Norwood, Charles A. Flammer and Albert J. Appell for appellants.

Gustav Lange, Jr., for respondents.

Order affirmed, with costs, and question certified answered in the negative; no opinion.

Concur: CHASE, COLLIN, CARDZOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

H. CLAY HOWARD, Respondent, *v.* EDWARD N. BREITUNG et al., Copartners under the Firm Name of BREITUNG & COMPANY, LTD., Appellants.

Howard v. Breitung. 178 App. Div. 889, affirmed.
(Argued June 7, 1917; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 5, 1917, which affirmed an order of Special Term overruling a demurrer to the complaint in an action on a contract by which plaintiff was employed by defendants to obtain a contract with the government of Peru for the irrigation and colonization of certain territory in that country. The amended complaint states two causes of action. The first for moneys claimed to have been actually earned under the contract between the plaintiff and the defendants up to

the time of the abandonment thereof and the second for damages for wrongful cancellation of the contract between the plaintiff and the defendants.

The following question was certified: "Does the second cause of action set forth in the complaint state facts sufficient to constitute a cause of action?"

Otto C. Sommerich and *Maxwell C. Katz* for appellants.

Alton B. Parker and *Henderson Peck* for respondent.

Order affirmed, with costs, and question certified answered in the affirmative; no opinion.

Concur: CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

ELIZABETH AGMINAS, Widow of FRANCIS AGMINAS, Deceased, Appellant, v. WILKES-BARRE COLLIERY COMPANY, Respondent.

Agminas v. Wilkes-Barre Colliery Co., 174 App. Div. 860, affirmed. (Argued June 7, 1917; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 9, 1916, which reversed an order of Special Term denying a motion to set aside the summons in the above-entitled action and granted said motion. The defendant is a foreign corporation organized and existing under the laws of the state of Pennsylvania. It claimed that it had no property or office and had never done any business in the state of New York and that, therefore, the summons was insufficient to give the court jurisdiction of the action.

The following question was certified: "Should service of the summons in this action upon the defendant be set aside?"

Ralph G. Barclay and Joseph Levy for appellant.

Edwards H. Childs and Stanhope Foster for respondent.

Order affirmed, with costs, and question certified answered in the affirmative; no opinion.

Concur: CHASE, COLLIN, CARDOWZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

In the Matter of the Claim of MAUD HOWARD, Respondent, against GEORGE HOWARD et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Howard v. Howard, 176 App. Div. 940, reversed.

(Argued June 7, 1917; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered February 2, 1917, affirming an award of the state industrial commission under the Workmen's Compensation Law. Claimant's husband was killed while engaged in supervising a detail of the roofing business carried on in his father's name. The question at issue was whether he was an employee of his father within the Workmen's Compensation Law.

Andrew J. Nellis and Merwyn H. Nellis for appellants.

Jeremiah D. Toomey for respondent.

Order reversed upon the authority of *Matter of Bowne v. Bowne* (221 N. Y. 28), with costs in this court and in the Appellate Division against the state industrial commission and the claim dismissed; no opinion.

Concur: CHASE, COLLIN, CARDOWZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

In the Matter of the Claim of GEORGE BANKS, Respondent, against THE ADAMS EXPRESS COMPANY, Appellant.
STATE INDUSTRIAL COMMISSION, Respondent.

Banks v. Adams Express Co., 176 App. Div. 916, affirmed.
(Argued June 7, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 17, 1917, affirming an award of the state industrial commission under the Workmen's Compensation Law. The claimant alleged that on August 6, 1915, Harry Banks fell to the street from a wagon on which he was working, and sustained a fracture of the skull, which caused his death. The employer contended that the sole cause of death was typhoid fever, and that the deceased did not receive any injury which caused or contributed to his death. The state industrial commission made an award on the following ground: "At the time of his accident, Harry Banks was suffering from typhoid fever in the incubation stage, which became aggravated by the severe injury to his head through the consequent lowering of his resisting power, and the said disease thus aggravated caused his death on August 18, 1915."

George W. Smyth and *Edward V. Conwell* for appellant.

Merton E. Lewis, Attorney-General (*E. C. Aiken* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ. Not voting: McLAUGHLIN, J.

In the Matter of the Claim of MAIMI KUCHARUK, Respondent, v. WILLIAM C. MCQUEEN et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Kucharuk v. McQueen, 176 App. Div. 928, affirmed.

(Argued June 8, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 17, 1917, affirming an award of the state industrial commission under the Workmen's Compensation Law. Claimant's husband was employed generally by Mr. Frank A. Fonda, who did work for the Saratoga County Sanitarium in grading and digging of ditches. The defendant McQueen had a contract for drilling a well for the supply of water for this sanitarium, and Fonda frequently loaned men to him and sometimes McQueen loaned men to Fonda. Fonda had nothing to do with the well drilling, except in loaning men to McQueen. On the thirtieth of September the man in charge of the well drilling asked Fonda for a couple of men and he sent Harry Kucharuk over with another man. Kucharuk was holding a wrench when the chain on the wrench broke and Kucharuk fell and the pipe hit him in the stomach. The question was whether the deceased, Kucharuk, was employed by McQueen at the time of the alleged accident or whether he was an employee of the county of Saratoga, and also as to whether or not the injuries sustained caused his death.

William H. Foster for appellants.

Egburt E. Woodbury, Attorney-General (E. C. Aiken, of counsel), for respondent.

Order affirmed, with costs, on authority of *Matter of De Noyer v. Cavanaugh* (221 N. Y. 273); no opinion.

Concur: CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN M. PHILLIPS, Appellant, v. ANDREW D. MORGAN et al., Composing the STATE HOSPITAL COMMISSION, Respondents.

People ex rel. Phillips v. Morgan, 173 App. Div. 988, affirmed.
(Argued June 8, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 9, 1916, which confirmed, on certiorari, a determination of the state hospital commission removing the relator, an honorably discharged veteran of the Spanish war, from the position of inspector of supplies. Respondents alleged in their return that relator was fairly tried and duly found, after a hearing, to be incompetent, unfit and lacking in the necessary qualifications for the position of inspector of supplies, and he, for that reason, was dismissed.

Eugene N. L. Young and *William McArthur* for appellant.

Merton E. Lewis, Attorney-General (*Wilber W. Chambers*, of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ. Not sitting: CRANE, J.

AMELIA J. COURT, Appellant, v. THE BANKERS' TRUST COMPANY, as Trustee, Respondent.

Court v. Bankers' Trust Co., 172 App. Div. 955, affirmed.
(Argued June 8, 1917; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 7, 1916, which affirmed an order of Special Term denying a motion by plaintiff for judgment in her favor upon the pleadings. The action is

against a trustee by the creator of a trust to enforce its revocation under section 23 of the Personal Property Law. The trust deed provided that upon the death of the plaintiff the principal should be paid to persons designated by her will or if she leave no will to the next of kin who are descendants of her father and mother. The answer set up five separate defenses: 1. That Anna B. Williams, who is the sister of the plaintiff, Edwin Sidney Williams, who is a brother of the plaintiff, and Grace Hilton, who is the adopted daughter of Payson Williams, a deceased brother of the plaintiff, are the descendants of the father and mother of the plaintiff according to law, and upon her death would be her next of kin of that description, and have not consented to the revocation of said trust or trusts. 2. That the said trust or trusts are irrevocable for the reason that until the death of the plaintiff the person or persons cannot be determined to whom the principal of the trust fund is directed to be paid. 3. That there is a defect of parties defendant in that the said Anna B. Williams, Edwin Sidney Williams and Grace Hilton are not made defendants. 4. That section 23 of the Personal Property Law is unconstitutional under the Constitution of the United States in so far as it permits the plaintiff to revoke said trust or trusts without the consent of said Anna B. Williams, Edwin Sidney Williams and Grace Hilton or of any other person or persons whomsoever. 5. That section 23 of the Personal Property Law is unconstitutional under the Constitution of the state of New York in so far as it permits the plaintiff to revoke said trust or trusts without the consent of the said Anna B. Williams, Edwin Sidney Williams and Grace Hilton or of any other person or persons whomsoever.

The following question was certified: "Is the plaintiff entitled to judgment on the pleadings?"

J. Noble Hayes for appellant.

Campbell Locke and *W. W. Green* for respondent.

Order affirmed, with costs, and question certified answered in the negative; no opinion.

Concur: CHASE, COLLIN, CARDZOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN and CRANE, JJ.

In the Matter of the Application of MANHATTAN RAILWAY COMPANY, Appellant, v. MARIE REICHE, Respondent.

Matter of Manhattan Ry. Co. v. Reiche, 178 App. Div. 894, affirmed.

(Argued June 8, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 27, 1917, which affirmed an order of Special Term dismissing a petition in condemnation proceedings. The proceeding was instituted by the plaintiff for the purpose of condemning certain real property and property rights in and to various parcels of land abutting on the various streets through which the plaintiff's elevated railroad was constructed and operated. Among these parcels was included a portion of certain land belonging to the defendant herein. Defendant contended that the trial should be of the single issue as to the metes and bounds of her property and the determination as to whether it was to be considered as an entire piece and parcel of land used and leased as such or whether the plaintiff was to be allowed of its own discretion to condemn but a portion of the same. Plaintiff refusing to try this issue the court of its own motion dismissed the petition.

J. Osgood Nichols, Francis S. Williams and James L. Quackenbush for appellant.

J. Noble Hayes and Edgar G. Wandless for respondent.

Order affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CARDZOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

**In the Matter of JOHN PALMIERI, an Attorney, Appellant.
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Respondent.**

Matter of Palmieri, 176 App. Div. 58, reversed.
(Argued April 23, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 16, 1917, disbarring the appellant herein from practice as an attorney and counselor at law.

Nathan L. Miller and *Howard Taylor* for appellant.

Thomas D. Thacher and *Einar Chrystie* for respondent.

Order reversed and proceedings dismissed on the ground that the evidence does not warrant the conclusion that there was intentional misconduct on the part of the appellant justifying his disbarment upon the charge sustained by the Appellate Division; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, HOGAN, POUND and ANDREWS, JJ. Dissenting: CHASE and CARDODOZO, JJ.

**In the Matter of the Transfer Tax upon the Estate of
JULIUS STEINWENDER, Deceased.**

TITLE GUARANTEE AND TRUST COMPANY et al., as Executors and Trustees, Appellants; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

Matter of Steinwender, 176 App. Div. 517, affirmed.
(Argued June 11, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 9, 1917, which affirmed an order of the New York County Surrogate's Court assessing a transfer tax at the rate of five per cent upon the remainders after

certain life estates provided for in the will of Julius Steinwender, deceased.

Harold Swain and Robert W. Cromley for appellants.

Schuyler C. Carlton and Lafayette B. Gleason for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, POUND and ANDREWS, JJ.

In the Matter of the Transfer Tax upon the Estate of
CHARLES CORY, Deceased.

JOHN M. CORY, Individually and as Executor, Appellant;
THE COMPTROLLER OF THE STATE OF NEW YORK,
Respondent.

Matter of Cory, 177 App. Div. 871, affirmed.
(Argued June 11, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 4, 1917, which reversed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Charles Cory, deceased. The question raised by the appeal has to do with the valuation to be placed upon five hundred shares of stock in the corporation of Chas. Cory & Son, Inc., which were owned by the testator at his death, and which were transferred by his executor to the appellant John M. Cory at an arbitrary valuation agreed upon by said decedent and said John M. Cory during the lifetime of the former. The appraiser reported that the fair market value of said shares was \$103,400, which valuation is not questioned on this appeal. The surrogate, however, on appeal, reduced the value to \$30,000, the sum fixed by the agreement. The Appellate Division held that the stock should be appraised for the

purpose of the transfer tax at its fair market value at the time of testator's death.

Austin E. Pressinger for appellant.

Alexander Otis, Schuyler C. Carlton and Lafayette B. Gleason for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, POUND and ANDREWS, JJ.

In the Matter of the Transfer Tax upon the Estate of
JOSEPH HAWES, Deceased.

WILLIAM E. STONE, as Trustee, Appellant; COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

Matter of Hawes, 175 App. Div. 983, affirmed.

(Argued June 11, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 24, 1916, which affirmed an order of the New York County Surrogate's Court assessing a transfer tax upon certain securities held at the time of decedent's death pursuant to a deed of trust. Decedent was a resident of Massachusetts. In 1864, when the deed was executed, no part of the trust property was either actually or constructively in the state of New York. Subsequently to the execution of the deed of trust, but before the decedent died, the trustees sold part of the trust property and with the proceeds purchased certain shares of stock of New York corporations which the transfer tax appraiser has reported taxable in this proceeding. On the part of the appellant, it is claimed that the assessment of the tax in this case is illegal, inequitable and improper for the following reasons: 1. The title to the property did not pass from the decedent to the beneficiary for the reason that the title was at all times in the trustee and came to

the beneficiary from the trustee, under the terms and provisions of the deed of trust. 2. Under the deed of trust, the decedent's next of kin and heirs at law had either a vested interest or a contingent interest which accrued in 1864, twenty-one years before the passage of the first Transfer Tax Act, and such interest cannot be constitutionally diminished by the assessment of a tax under a Transfer Tax Act subsequently passed. 3. The transfer of title from decedent to the trustees was effected in a foreign state and the state of New York had no jurisdiction over the person who executed the deed, nor dominion over the property transferred by the deed, and none of the rights of the individuals mentioned in the deed accrued by reason of any privilege granted by the state of New York.

Henry A. Miller and John S. Jenkins for appellant.

Theodore du Moulin, Thomas A. S. Beattie and Thomas E. Rush for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, POUND and ANDREWS, JJ.

ORLANDO T. CARPENTER, as Administrator with the Will Annexed of CAROLINE L. CARPENTER, Deceased, Plaintiff, v. THE NEW YORK TRUST COMPANY et al., Defendants.

In the Matter of the Petition of JAMES DUNNE et al., Appellants; CHARLES RUSH et al., as Executors of REESE CARPENTER, Deceased, et al., Respondents.

Carpenter v. N. Y. Trust Co., 177 App. Div. 914, affirmed.
(Argued June 11, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

March 16, 1917, which affirmed an order of Special Term denying a motion to have determined and enforced an attorneys' lien on the ground that the proceeding was premature and that under their retainer before the attorneys can enforce their lien there must be a final judgment. The plaintiff entered into an agreement with his attorneys to pay them a sum equal to fifty per cent of any recovery that might be obtained in proceedings against the defendants. The agreement provided that said attorneys were to institute, prosecute and maintain such action or actions, proceeding or proceedings as to them may seem advisable. An action was instituted which resulted in a decree favorable to the plaintiff. The decree, among other things, provided that the attorneys' lien, pursuant to the contract of retainer, should be enforced as against the amount awarded under the decree to the plaintiff. Upon appeal to the Appellate Division the judgment was modified so as to strike therefrom any provision for the payment of the attorneys under their lien as not properly being a part of the issues in the action. An appeal from such judgment has been taken to the Court of Appeals.

James Dunne for appellants.

Michael Kirtland for Charles Rush et al., as executors, respondents.

Edmund J. Donegan and *Leonidas Dennis* for plaintiff, respondent.

Order affirming the order of Special Term, which dismissed the proceeding as premature without prejudice to any proceedings that might be instituted after the action has been finally disposed of, affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, POUND and ANDREWS, JJ.

KOBRE ASSETS CORPORATION, Respondent, v. HYMAN D. BAKER, Appellant, Impleaded with Others.

Kobre Assets Corp. v. Baker, 178 App. Div. 62, affirmed.

(Argued June 11, 1917; decided July 11, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 20, 1917, which affirmed an order of Special Term denying a motion by defendant for judgment in his favor upon the pleadings. The amended complaint recites an agreement between the Ancient Order of Hibernians and the Fifth Avenue Amusement Company, under which the Fifth Avenue Amusement Company is entitled to the sum of \$6,500, with interest; that the said agreement was duly assigned by the defendant Fifth Avenue Amusement Company for a valuable consideration to one Max Kobre about seven weeks prior to the filing of a petition in bankruptcy against the said Max Kobre; that the said Max Kobre, subsequent to the time of the filing of said petition aforesaid, pretended to sell, transfer and deliver all of the right, title and interest which the said Max Kobre had in the assignment of the agreement between the Ancient Order of Hibernians and the Fifth Avenue Amusement Company to the defendant, Hyman D. Baker, which assignment was dated back about two months, and that the same was done without any consideration, fraudulently, preferentially, collusively and with the intent to delay, hinder and defraud his creditors, while the said Max Kobre was insolvent and was known to be such by himself as well as said Hyman D. Baker. Plaintiff asked for judgment against the defendant Hyman D. Baker, declaring the assignment from Max Kobre to said Hyman D. Baker void, as preferential and fraudulent against the creditors of Max Kobre's Bank, as well as this plaintiff, and that the said Hyman D. Baker be directed to immediately deliver up the same so that it would be canceled. A personal judgment is sought against the Ancient Order of Hibernians,

and that as far as the administratrix of Max Kobre is concerned, that she be barred of any and all rights she may have or claim to have under such assignment and the original agreement upon which it is based.

The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

J. A. Seidman for appellant.

Virginius Victor Zipris for respondent.

Order affirmed, with costs, and question certified answered in the affirmative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, POUND and ANDREWS, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
CHARLES H. GAAB, Respondent.**

**THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
DAVID WALLACE, Respondent.**

**THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
HENRY WETZEL, Respondent.**

People v. Gaab, 177 App. Div. 192, appeal dismissed.

People v. Wallace, 177 App. Div. 928, appeal dismissed.

People v. Wetzel, 177 App. Div. 928, appeal dismissed.

(Argued June 12, 1917; decided July 11, 1917.)

APPEAL in each of the above-entitled actions from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 9, 1917, which affirmed an order of the Court of Special Sessions of the City of New York granting a motion in arrest of judgment. Each defendant sold a loaf of bread, unwrapped, without any label or tag attached thereto showing either standard weight, standard measure or numerical count. For this act he was accused of a crime, as having committed a misdemeanor. Upon these facts the only question to be determined was whether there was

any provision of law compelling the affixing of a label or tag to a single, unwrapped loaf of bread. The statute alleged to have been violated was article 2 of the General Business Law. The contention of the prosecution was that a label or tag was necessary because (1) bread must be sold by weight; and (2) sale by weight being required, there must be a label or tag attached showing such weight. The Appellate Division, in unanimously affirming the orders in arrest of judgment, held there was no such requirement of statute.

Harry E. Lewis, District Attorney (Harry G. Anderson of counsel), for appellant.

Ellwood M. Rabenold for respondent.

Appeal in each case dismissed on the authority of *People v. Malone* (169 N. Y. 568) and New York Inferior Criminal Courts Act (§ 40); no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDENZO, POUND, CRANE and ANDREWS, JJ.

In the Matter of the Application of STAFFORD HENDRIX, Appellant, for a Writ of Mandamus to the COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, Respondent.

Matter of Hendrix, 177 App. Div. 898, affirmed.
(Submitted June 12, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered February 9, 1917, which affirmed an order of Special Term denying a motion for a writ of mandamus directed to the justices of the Court of Special Sessions of the city of New York, borough of Brooklyn, commanding the said justices to vacate, set aside and expunge a *prima facie* void, invalid and illegal finding, entered October 16, 1912, and further commanding the said court and

justices to enter an order dismissing the *prima facie* void information filed in said court September 10, 1912, entitled the People against Stafford Hendrix, or in the alternative, if the court upon such application shall determine that the right of the applicant to the issuance of such peremptory writ of mandamus does not depend upon the question of law only, then, in that event, for an order directing that an alternative writ of mandamus issue out of and under the seal of this court directed to the Court of Special Sessions, second department, located in Brooklyn aforesaid, commanding the vacation of the *prima facie* void and illegal order and finding of October 16, 1912, in said court, and the entry of an order as of that date, dismissing said void information and discharging the defendant thereunder.

Wilbur F. Hendrix for appellant.

Harry Lewis, District Attorney (Harry G. Anderson of counsel), for respondent.

Order affirmed; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

In the Matter of the Assignment of THOMAS H. SPAULDING et al., Doing Business under the Firm Name of SPAULDING MACHINE SCREW COMPANY.

WILLIAM H. CROSBY, Appellant; JOHN R. KEIM et al., Respondents.

Matter of Spaulding, 172 App. Div. 981, affirmed.
(Argued June 12, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 5, 1916, which affirmed an order of Special Term settling the accounts of an assignee for the benefit

of creditors. Appellant contended that the account as presented and settled was on its face false and fabricated, and not a legal account, and was not entitled in law to be allowed or settled.

Edward R. Bosley and Norris Morey for appellant.

Charles E. Rushmore for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

In the Matter of the Accounting of the FARMERS' LOAN
AND TRUST COMPANY, as Trustee under the Will of
VALENTINE MOTT, Deceased, Respondent.

KATE W. R. BLACQUE, Individually and as Executrix of
VALENTINE A. BLACQUE, Appellant; LILLIE C. BOYD,
Individually and as Executrix of FANNIE M. CAMPBELL,
Deceased, et al., Respondents.

(Argued June 13, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 30, 1917, which affirmed a decree of the New York County Surrogate's Court construing the will of Valentine Mott, deceased. Testator by his will after providing for two trust funds, the income of which should be payable respectively to two grandchildren during his or her life, provided: "Upon the death of either I give, devise and bequeath his or her share to his or her issue if any, if there be no issue, then to my surviving children and the issue of those deceased." One of the grandchildren had issue which predeceased him. Upon his death his widow claimed the trust fund as sole inheritrix of the deceased child. The question presented was whether

the gift to the issue of the *cestui que trust* should be limited to issue which survived him.

Howard Taylor and Stephen P. Nash for appellant.

Frederick Geller and Frederic R. Keator for Farmers' Loan and Trust Company, as trustee, respondent.

Merrill Bishop and Verne M. Bovie for Lillie C. Boyd, individually and as executrix, respondent.

Charles E. Lydecker for Valentine Mott et al., respondents.

Henry A. Uterhart for Fannie Van Schaick, respondent.

John H. Bogardus and Robert W. Candler for Isaac Bell et al., respondents.

Daniel D. Sherman and Henry W. Jessup for Virginia L. Meert et al., respondents.

Henry Gansevoort Sanford for Valentine Mott et al., respondents.

Charles M. Bleecker for Mary D. Caroline, respondent.

W. E. Kisselburgh, Jr., for J. V. Mott, respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. ARTHUR PLAUT, Appellant.**

People v. Plaut, 178 App. Div. 930, affirmed.
(Submitted June 18, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 11, 1917, which affirmed a judgment of the

court at a Trial Term for the county of Kings rendered upon a verdict convicting the defendant of the crime of giving and offering a bribe.

Ira Leo Bamberger and *Sidney Lowenthal* for appellant.

Harry E. Lewis, District Attorney (*Ralph E. Hemstreet* of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: **HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDZOZ, POUND, CRANE and ANDREWS, JJ.**

THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
v. R. F. STEVENS COMPANY, INC., Respondent.

People v. Stevens Co., Inc., 178 App. Div. 806, appeal dismissed.
(Argued June 18, 1917; decided July 11, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 14, 1917, which reversed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of a violation of section 8-a of article 2 of the Labor Law in operating its factory on a Sunday by requiring and allowing one Daniel Callaghan to work in the pasteurizing department on Sunday, October 29, 1916, without first posting on the premises a schedule and filing a copy of the said schedule with the commissioner of labor, containing the name of the said Daniel Callaghan, with a designation of the day of rest for him.

Harry E. Lewis, District Attorney (*Harry G. Anderson* of counsel), for appellant.

William B. Carswell for respondent.

Appeal dismissed; no opinion.

Concur: **HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDZOZ, POUND, CRANE and ANDREWS, JJ.**

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. ALBERT E. MCVEA, Appellant.**

People v. McVea, 175 App. Div. 909, affirmed.
(Submitted June 13, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 4, 1916, which affirmed a judgment of the Genesee County Court convicting the defendant of a violation of the Liquor Tax Law. The defendant was charged with permitting a girl, in his employ, to serve drinks to customers on the premises, but the defendant's contention and defense was that this girl was a servant of the defendant and had been in his employ for nearly three years as a domestic and servant, with various duties about the household, such as doing the kitchen and dining room work, waiting on tables, etc.; and that as such servant she constituted, while so employed and for such a length of time, a member of the defendant's family, and as such came within the exception of the statute and was a person by whom liquors might be served on the premises.

William E. Webster for appellant.

James L. Kelly for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. JOSEPH A. MULHOLLAND, Appellant.**

(Argued June 14, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Supreme Court rendered March 2, 1917, at a Trial Term for the county

of New York upon a verdict convicting the defendant of the crime of murder in the first degree.

Ely Rosenberg and Frederick A. Ware for appellant.

Edward Swann, District Attorney (Robert C. Taylor of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. Alexander Schuster, Appellant.**

(Argued June 14, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Court of General Sessions of the Peace in the county of New York rendered February 28, 1917, upon a verdict convicting the defendant of the crime of murder in the first degree.

Edward B. Bloss for appellant.

Edward Swann, District Attorney (Robert C. Taylor of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. Theodore Calabrese, Appellant.**

People v. Calabrese, 174 App. Div. 982, affirmed.

(Argued June 14, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 5, 1916, which affirmed a judgment of the court at a Trial Term for the county of Nassau

rendered upon a verdict convicting the defendant of the crime of murder in the second degree.

Harry W. Moore for appellant.

Charles I. Wood and *Charles R. Weeks* for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, CARDZOZ, POUND, CRANE and ANDREWS, JJ. Dissenting: HOGAN, J.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. PASQUALE MILONE, Appellant.**

People v. Milone, 173 App. Div. 987, affirmed.

(Argued June 14, 1917; decided July 11, 1917.)

APPEAL from a judgment of Appellate Division of the Supreme Court in the first judicial department, entered April 28, 1916, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of kidnapping.

Wayne M. Musgrave for appellant.

Edward Swann, District Attorney (Robert S. Johnstone of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDZOZ, POUND, CRANE and ANDREWS, JJ.

GENERAL DEHYDRATOR COMPANY, Respondent, v. F. W. BUSSING COMPANY, Appellant.

General Dehydrator Co. v. Bussing Co., 178 App. Div. 508, appeal dismissed.

(Submitted June 14, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered February 17, 1917, which reversed a judgment in favor of defendant entered upon an order of Special Term granting a motion for judgment in its favor upon the pleadings. This action was commenced to recover the balance of the contract price of a machine manufactured for defendant. A warrant of attachment was issued which was discharged upon defendant's giving an undertaking. Simultaneously a similar action was commenced in New Jersey upon the same cause of action which resulted in a judgment for plaintiff which was satisfied by payment in full. In the meantime no proceedings had been taken by either party in the New York action, but after paying the judgment in the New Jersey action defendant made a motion herein to dismiss this action for want of prosecution, which was denied upon condition that plaintiff immediately proceed with the case, whereupon the case was for the first time placed upon the calendar for trial by plaintiff. Defendant then, pursuant to leave of court, interposed a supplemental answer, setting up as "a second, separate and distinct defense" the recovery and payment of the New Jersey judgment, to which plaintiff replied, admitting the allegations of fact therein. Defendant thereupon moved for judgment on the pleadings, and plaintiff in answer to this motion also moved for judgment thereon in its favor. An order was made granting defendant's motion, upon which a judgment was rendered in defendant's favor dismissing plaintiff's complaint and vacating its warrant of attachment.

David W. Kahn for appellant.

Arleigh Pelham and *Andrew R. Shiland* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: *HISCOCK*, Ch. J., *CUDDEBACK*, *HOGAN*, *CARDOZO*, *POUND*, *CRANE* and *ANDREWS*, JJ.

THE CITY OF NEW YORK, Appellant, *v.* LUCIUS H. BEERS, as Trustee of the Estate of ROBERT STEWART, Respondent.

City of New York v. Beers, 163 App. Div. 495, affirmed.
(Argued June 15, 1917; decided July 11, 1917.)

APPEAL from a judgment, entered July 24, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury and directing a dismissal of the complaint in an action to recover from the defendant, as trustee of the estate of Robert Stewart, a tax assessed under the direction of the board of taxes and assessments of the city of New York for the year 1911, upon personal property held for the estate by the defendant, assessed as a resident of the borough of Manhattan, in the city of New York. For a separate defense to the action the defendant alleged that on the 1st day of July, 1911, the defendant was, and ever since the 1st day of July, 1910, as well as long prior thereto, had been, continuously a resident of Westhampton Beach, town of Southampton, county of Suffolk, and state of New York, and was not, on any of said dates, or during any of said time, a resident of the borough of Manhattan, or of the city of New York.

Lamar Hardy, Corporation Counsel (William H. King of counsel), for appellant.

Howard Mansfield and Henry de Forest Baldwin for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

**A. SANFORD ADLER, Respondent, v. CHARLES S. FURST,
Appellant.**

Adler v. Furst, 163 App. Div. 892, affirmed.

(Argued June 15, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 2, 1914, affirming a judgment in favor of plaintiff entered upon a verdict. The plaintiff alleged that prior to or on or about June 19, 1906, the plaintiff and defendant had had mutual dealings, and had made mutually disputed claims against one another, and that on or about that day they entered into a written contract of settlement of their disputed claims, by the terms of which the defendant agreed to pay a certain proportion of certain claims of third parties against the plaintiff; that the plaintiff had thereupon paid the claims mentioned and notified the defendant thereof, but that the defendant had refused to pay his proportionate share thereof.

Joseph M. Proskauer, Wesley S. Sawyer and Albert I. Sire for appellant.

Henry Wollman, Edward S. Seidman, M. L. Malavinsky and W. H. Milholland for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDENZO, POUND, CRANE and ANDREWS, JJ.

DULLES-BALDWIN ELECTRIC DRILL COMPANY, Respondent, v. PITTSBURG CONTRACTING COMPANY, Appellant.

Dulles-Baldwin El. Drill Co. v. Pittsburg Contracting Co., 166 App. Div. 921, affirmed.

(Submitted June 15, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered January 29, 1915, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover balance alleged to be due for electric drills, repair and supply parts sold and delivered to defendant. On the trial defendant was permitted to amend its answer so as to counterclaim for a like amount for breach of the warranty contained in the contract for the sale of the drills, claiming that the extra parts were furnished under an agreement to replace defective parts and that the drills delivered were not of first-class material or workmanship and were defective and that the repair parts delivered and sued for were so delivered to supply said defects in the original drills. The issue particularly litigated at the trial was whether defendant had, under the written contract, as construed by the court, given plaintiff, respondent, "immediate written notice of such defects" in the drills.

John R. Dos Passos, Cyril F. Dos Passos and John Ambrose Goodwin for appellant.

Martin Conboy for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDENZO, POUND, CRANE and ANDREWS, JJ.

EDWARD R. APARICIO, Respondent, v. NEW ENGLAND EQUITABLE INSURANCE COMPANY, Appellant.

Aparicio v. New England Equitable Ins. Co., 177 App. Div. 551, affirmed.

(Submitted June 15, 1917; decided July 11, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 3, 1917, affirming a judgment in favor of plaintiff entered upon an order of Special Term granting a motion by plaintiff for judgment in his favor upon the

pleadings. The plaintiff herein sued one Arteaga and one Richards and in said action replevied certain specific property. In the course of that action the defendant Arteaga gave a re-delivery bond upon which bond the defendant herein was surety. Judgment was entered in that action in favor of the plaintiff herein, and an execution on said judgment was duly issued and returned unsatisfied. The plaintiff then brought the present action to recover on the re-delivery bond. The answer of the defendant admitted the material allegations of the complaint and attempted to set up by way of affirmative defense and counterclaim that the said judgment was procured by the perjury of the plaintiff herein. The plaintiff demurred to this defense and counterclaim.

Theodore du Moulin for appellant.

Herman Espen and *Samuel H. Guggenheim* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, HOGAN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

CHARLES E. McDONALD, as Administrator of the Estate of JAMES W. McDONALD, Deceased, Respondent, *v.* THE STATE OF NEW YORK, Appellant.

McDonald v. State of New York, 178 App. Div. 943, appeal dismissed.

(Submitted July 11, 1917; decided July 11, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 17, 1917, unanimously affirming a judgment in favor of plaintiff entered upon an award of the Court of Claims.

The motion was made upon the ground that the judg-

ment appealed from was not reviewable by the Court of Appeals.

Elijah W. Holt for motion.

Carey D. Davie opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

ANNA W. WOODWARD, Appellant, v. NEW YORK RAILWAYS COMPANY, Respondent.

(Submitted July 11, 1917; decided July 11, 1917.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 221 N. Y. 538.)

JAMES G. MARTIN, Respondent, v. HUGH N. CAMP, JR., as Executor of FREDERIC E. CAMP, Deceased, et al., Appellants.

(Submitted July 11, 1917; decided July 11, 1917.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 219 N. Y. 170, 627; 220 N. Y. 653.)

RUBBER TRADING COMPANY, Respondent, v. MANHATTAN RUBBER MANUFACTURING COMPANY, Appellant.

(Submitted July 11, 1917; decided July 11, 1917.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 221 N. Y. 120.)

ALBRO J. NEWTON COMPANY, Respondent, *v.* HENRY ERICKSON et al., Individually and as Business Agents of the JOINT DISTRICT COUNCIL OF NEW YORK AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, and AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS OF AMERICA et al., Appellants.

Newton Company v. Erickson, 165 App. Div. 930, reversed.
(Argued April 6, 1917; decided October 9, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department entered January 7, 1915, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to restrain the defendants from conspiring, combining or acting in concert in any manner to injure or interfere with the plaintiff's good will, trade or business.

Charles Maitland Beattie for appellants.

Walter Gordon Merritt for respondent.

Judgment reversed and complaint dismissed, with costs in all courts, on the authority of decision in *Bossert v. Dhuy* (221 N. Y. 342).

Concur: CHASE, COLLIN, HOGAN, CARDODOZO, POUND and ANDREWS, JJ. Taking no part: CRANE, J.

DOMINIQUE VECCHINI, Respondent, *v.* ADOLPH E. WUPPERMANN, Appellant, Impleaded with Others.

Vecchini v. Wuppermann, 176 App. Div. 908, appeal dismissed.
(Submitted October 1, 1917; decided October 9, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first

judicial department, entered January 26, 1917, affirming a judgment in favor of plaintiff entered upon a verdict.

The motion was made upon the grounds that affirmance by the Appellate Division was unanimous; that the exceptions were frivolous; that no questions of law were involved and that the appeal was taken solely for delay.

James Gordon for motion.

Arthur Furber opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

BIRT SMITH, Plaintiff, *v.* JOHN L. SMITH, Appellant, and LYMAN C. SMITH, Respondent, Impleaded with Others.

Smith v. Smith, 173 App. Div. 524, appeal dismissed.
(Submitted October 1, 1917; decided October 9, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 19, 1916, affirming a judgment of the Erie County Court, entered upon a verdict. Also appeals from an order of said Appellate Division dismissing two appeals.

The motion was made upon the grounds that no exceptions survived the unanimous affirmance by the Appellate Division and that permission to appeal had not been obtained.

Ernest F. Kruse for motion.

Adelbert Moot and Helen Z. M. Rodgers opposed.

Motion granted and appeals dismissed, with costs and ten dollars costs of motion.

MARGARET COURSEY, Respondent, *v.* STEPHEN COURSEY, Defendant, and THE GENEVA MINERAL SPRINGS COMPANY, LIMITED, Appellant, Impleaded with Others.

Coursey v. Geneva Mineral Springs Co., Ltd., 176 App. Div. 947, appeal dismissed.

(Argued October 1, 1917; decided October 9, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 20, 1917, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose two mortgages.

The motion was made upon the grounds that the Appellate Division had unanimously decided that there was evidence supporting or tending to sustain findings of fact and that the exceptions were frivolous.

Arthur J. Hammond for motion.

Myron D. Short opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

ROBINSON AMUSEMENT COMPANY, Respondent,
v. BRIGHTON BEACH CASINO, Appellant.

Robinson Amusement Co. v. Brighton Beach Casino, 177 App. Div. 899, appeal dismissed.

(Submitted October 1, 1917; decided October 9, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 13, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action of ejectment.

The motion was made upon the grounds that the affirmance by the Appellate Division was unanimous, that the exceptions were frivolous; that no questions of law were involved and that the appeal was taken solely for purpose of delay.

Daniel E. Lynch for motion.

George W. Martin opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

In the Matter of the Application of LANSING LIQUIDATION CORPORATION, Appellant, for the Appointment of Three Persons to Appraise the Value of Its Stock.

BANKERS ENCYCLOPEDIA COMPANY, Respondent.

Matter of Lansing Liquidation Corporation, 176 App. Div. 914, appeal dismissed.

(Submitted October 1, 1917; decided October 9, 1917.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 26, 1917, which affirmed an order of Special Term in a proceeding for the appointment of appraisers.

The motion was made upon the ground that no appeal lay to the Court of Appeals from the order of the Appellate Division.

H. Gerald Chapin for motion.

No one opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

In the Matter of the Accounting of ELIZABETH P. DEG. JAMES, as Executrix of AMEDEE DEG. JAMES, Deceased, Respondent.

GEORGE W. P. DEG. JAMES et al., Appellants.

(Submitted October 1, 1917; decided October 9, 1917.)

Motion for re-argument or to amend remittitur denied, with ten dollars costs and necessary printing disbursements. (See 221 N. Y. 242.)

EMANUEL HERTZ, Respondent, v. GEORGE A. WHEELOCK, Appellant.

Hertz v. Wheelock, 173 App. Div. 937, appeal dismissed.

(Argued October 1, 1917; decided October 9, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 1, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action for services.

The motion was made upon the grounds that the affirmance by the Appellate Division was unanimous; that the exceptions were frivolous; that no questions of law were presented for review and that the appeal was taken solely for purposes of delay.

Frank Moss for motion.

Nash Rockwood opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

JOHN SCHMIDT, Respondent, *v.* LEONHARDT MICHEL BREWING COMPANY, Appellant.

(Submitted October 1, 1917; decided October 9, 1917.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 221 N. Y. 228.)

ISAAC E. CHAPMAN et al., Appellants, *v.* L. E. WATERMAN COMPANY, Respondent.

Chapman v. Waterman Co., 176 App. Div. 697, appeal dismissed.
(Argued October 1, 1917; decided October 9, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 13, 1917, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the judgment appealed from was interlocutory and did not finally determine the action.

Walter B. Raymond for motion.

Richard L. Phillips and *Frank Harvey Field* opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

EDITH E. H. MCINTOSH, Respondent, *v.* ARTHUR P. WOLFE, Appellant.

McIntosh v. Wolfe, 146 App. Div. 885, appeal dismissed.
(Submitted October 1, 1917; decided October 9, 1917.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 11, 1911, affirming a

judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant.

The motion was made upon the grounds that the Court of Appeals was without jurisdiction to hear the appeal and that the appellant had been guilty of laches in filing the return.

Guy B. Moore for motion.

Francis F. Baker opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

In the Matter of the Accounting of PERCY D. ELLIOTT et al., as Trustees under the Will of JOHN G. ELLIOTT, Deceased, Respondents.

ALINE D. ELLIOTT, Appellant.

Matter of Elliott, 179 App. Div. 911, appeal dismissed.
(Argued October 2, 1917; decided October 10, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 22, 1917, which affirmed a decree of the Orange County Surrogate's Court judicially settling the accounts of the trustees under the will of John G. Elliott, deceased, and overruling objections thereto.

William R. Conklin, Peyton Randolph Harris and Harry D. Holden for appellant.

Nathan Ballin, Warren W. Foster and Jacob Newman for respondents.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

**ESTELLE P. ANDERSON, Appellant, v. STEINWAY & SONS,
Respondent.**

Vendor and purchaser — when inequitable to decree specific performance of contract for purchase of real property.

Where, in an action to compel specific performance of a contract to purchase real property it appears that the contract was understood by the contracting parties to be wholly dependent upon the defendant obtaining title to plaintiff's and other real property, mentioned therein, the title to all of which was to be taken solely for a purpose which has either been prevented by a city ordinance or can only be carried out after successfully maintaining in the courts that such ordinance is unconstitutional, it would be inequitable to decree specific performance.

Anderson v. Steinway & Sons, 178 App. Div. 507, affirmed.

(Argued October 8, 1917; decided October 16, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 8, 1917, which reversed an order of Special Term granting a motion by plaintiff for judgment in her favor upon the pleadings in an action to compel specific performance of a contract to purchase certain real property in the city of New York. As a defense and counterclaim the defendant alleged that the board of estimate and apportionment of the city of New York did, subsequent to the signing of the said contract, pursuant to power and authority delegated to it by chapter 470 of the Laws of 1914, as amended by chapter 503 (497) of the Laws of 1916 of the state of New York, pass a building zone resolution dividing the city into three classes of districts: (1) Residence districts, (2) business districts, (3) unrestricted districts, and by said resolution it was provided that in a residence district no building should be erected other than a building designed for certain specific uses and such specific uses exclude and prohibit the erection of any building within such district for business purposes; that by the resolution the block on Fifty-eighth street, between Sixth and Seventh

avenues, where plaintiff's property was located, was designated as a residence district. The defendant alleged that such resolution and the building restriction therein contained constituted an incumbrance on the property, and that the plaintiff was, therefore, unable to convey the title which she had agreed to convey to the defendant, and that the plaintiff's title was unmarketable.

The following question was certified: "Is the plaintiff, respondent, herein entitled to judgment upon the pleadings?"

Robert W. Bonynge for appellant.

Walter B. Solinger and *Fernando Solinger* for respondent.

Austen G. Fox, Ira A. Place and *William A. Evans* for Herman M. Biggs et al., *amici curiae*.

Lamar Hardy, Corporation Counsel (Terence Farley and Leon N. Futter of counsel), for city of New York, intervening.

Per Curiam. It appears from the contract in controversy and the pleadings that it was understood by the contracting parties to be wholly dependent upon the defendant obtaining title to plaintiff's and other real property, mentioned in the contract, the title to all of which was to be taken solely for a purpose which has either been prevented by the ordinance in question or can only be carried out after successfully maintaining in the courts that such ordinance is unconstitutional, and it would be inequitable in this case to decree specific performance. The opinion of Justice SCOTT of the Appellate Division, so far as it discusses the question upon which we place our decision, is approved.

The order should be affirmed, with costs, and question certified answered in the negative.

CHASE, CUDDEBACK, HOGAN, McLAUGHLIN and ANDREWS, JJ., concur; HISCOCK, Ch. J., and POUND, J., dissent.

Order affirmed.

JAMES B. ANDREWS, as Testamentary Trustee under the Will of WILLIAM P. KIRK, Deceased, Appellant, *v.* ANNIE L. KIRK, Individually and as Testamentary Trustee under the Will of WILLIAM P. KIRK, Deceased, et al., Defendants, and FLORENCE KIRK, Respondent.

Andrews v. Kirk, 175 App. Div. 975, affirmed.

(Argued October 1, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 6, 1916, which affirmed an order of Special Term sustaining a demurrer to the complaint and granting a motion by defendant, respondent, for judgment on the pleadings. The action was for partition. Defendant, respondent, demurred on the grounds: "First. That there was a defect of parties plaintiff, in that Annie L. Kirk, as one of the testamentary trustees of and under the last Will and Testament of William P. Kirk, deceased, had not been joined as a party plaintiff and no reason or excuse had been stated for the failure so to do. Second. That the complaint did not state facts sufficient to constitute a cause of action." In support of the motion it was contended that in no event could one of the two acting testamentary trustees maintain an action for partition, and that the complaint did not state facts sufficient to constitute a cause of action in that it failed to state facts showing that the sole plaintiff had such an interest or estate in the real property as to authorize him to bring an action for partition.

Edwin C. Mulligan and Charles H. Beckett for appellant.

Harold Swain and Hamilton C. Rickaby for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

In the Matter of the Accounting of **FREDERICK J. GREIFENSTEIN et al., as Executors of FRANK ROOS, Deceased, Appellants.**

ROSA ROOS et al., Respondents.

Matter of Greifenstein, 174 App. Div. 891, affirmed.

(Submitted October 1, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 23, 1916, which affirmed three decrees of the Kings County Surrogate's Court, *first*, surcharging the accounts of the executors of Frank Roos, deceased; *second*, removing them as executors, and *third*, removing them as testamentary guardians. The grounds for the removal of the executors as such and the revocation of their letters testamentary and as testamentary guardians, were that they were guilty of wasting the estate in neglecting to foreclose a second mortgage, and in not having a receiver of the rents appointed before a receiver was appointed in a first mortgage foreclosure which extinguished the second mortgage.

Franklin P. Trautmann for appellants.

Charles W. Froessel and *Joseph A. Keenan* for respondents.

Order affirmed, with costs; no opinion.

Concur: **HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.**

In the Matter of the Petition of FRED CARP and WILLIAM S. OSTRANDER, Appellants, for a Writ of Certiorari to Review Proceedings of the BOARD OF SUPERVISORS OF SARATOGA COUNTY, Respondent.

Matter of Carp, 179 App. Div. 387, affirmed.

(Argued October 1, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 6, 1917, which dismissed a writ of certiorari issued by the Appellate Division in the third department to review proceedings by the board of supervisors of Saratoga county with reference to the appointment of a commissioner of elections. The cause was transferred to the fourth department for hearing and determination. The appeal was dismissed upon the ground that certiorari was not the proper remedy to test title to a public office, an action in the nature of quo warranto being the exclusive remedy.

Harvey D. Hinman for appellants.

Lewis E. Carr for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDZOZO, McLAUGHLIN and CRANE, JJ.

In the Matter of the Accounting of EMMA L. HARDEN et al., as Executors of JAMES HARDEN, Deceased, Respondents.

FRANCIS A. HARDEN et al., Appellants; JAMES HARDEN et al., Respondents.

Matter of Harden, 177 App. Div. 831, affirmed.

(Argued October 1, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

May 22, 1917, which modified and affirmed as modified a decree of the New York County Surrogate's Court settling the accounts of the executors of James Harden, deceased, construing certain portions of his will and directing distribution in accordance therewith. Testator by his will divided his residuary estate between his widow, four sons and two daughters. He then provided: "It is also my will and I hereby direct, that the shares of stock of the Acheson Harden Company, which I may own at the time of my decease, be distributed by my said executors in kind in lieu of the proceeds of the same in money in payment if sufficient, or part payment if not sufficient of the shares of my residuary estate herein given and bequeathed to my sons, Francis Acheson Harden and James Harden, and the shares directed to be held in trust for the benefit of my sons, Acheson Adair Harden and Ross Harden, an equal amount of said stock, however, to be distributed to each of said sons, and that said stock shall be so received by said sons, Francis Acheson Harden and James Harden, and the trustees herein appointed of the said trusts for the benefit of my said sons, Acheson Adair Harden and Ross Harden, and I further direct that for the purposes of fixing the value and amount of my residuary estate in order to determine the amounts of the several shares into which I have directed the same to be divided, and making the distribution hereinbefore directed, that the said stock be considered and taken to be worth its par value, and shall be so distributed and received in lieu of a sum of money equivalent to its par value; it being my intention hereby that all the stock which I may own in the Acheson Harden Company at the time of my decease shall be distributed by my executors in lieu of cash, in or towards the payment of the said shares herein given and bequeathed to my sons, Francis Acheson Harden and James Harden, and the shares directed to be held in trust by my executors and trustees for the benefit of my sons, Acheson Adair Harden and Ross

Harden, before applying any of said stock or the proceeds thereof towards the payment of the shares of my residuary estate herein given to my said wife or to be held in trust for the benefit of my said two daughters respectively." The sons contended that any shares allotted in part payment of the residuary portions of the widow and two daughters shall be taken at their appraised value (\$175 a share) at the time fixed for distribution; while the widow and daughters contend that these shares should be taken at their par value. The surrogate sustained the contentions of the sons. The Appellate Division modified the decree so as to direct that the stock allotted to the widow and daughters (as well as that allotted to the sons) be taken at its par value, and the income be divided equally between all the portions.

Herbert J. Bickford and Sidney Harris for appellants.

Gilbert D. Lamb, John S. Sheppard, Jr., and Egerton L. Winthrop, Jr., for respondents.

Order affirmed, with costs to respondents payable out of the estate; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDODOZ and CRANE, JJ. Dissenting: COLLIN, J. Not voting: McLAUGHLIN, J.

In the Matter of the Accounting of FLORENCE B. MEAD et al., as Executors of WILLIAM E. ADAMSON, Deceased.

FLORENCE B. MEAD, Individually and as Executrix, Appellant and Respondent; WILLIAM E. HALLOCK et al., Respondents and Appellants; JOHN B. CLARK, Individually and as Executor, et al., Respondents.

Matter of Mead, 173 App. Div. 982, affirmed.

(Argued October 1, 1917; decided October 16, 1917.)

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the second judicial depart-

ment, entered May 19, 1916, which affirmed a decree of the Kings County Surrogate's Court surcharging and settling the accounts of the executors of William E. Adamson, deceased. The sole question in this court was as to the legal effect of the attempted gift by the decedent to the executrix Florence B. Mead of the sum of \$40,000, represented by two checks for \$20,000 each. The executors claimed that there was a completed gift of the two checks, and that they were justified in allowing the executrix Florence B. Mead to keep the said \$40,000 and in not making any mention of it in their account. The contestants claimed that there was no completed gift of either check, and that the \$40,000 are assets of the estate for which the executors must account. The surrogate held that the gift was complete as to one check of \$20,000 and incomplete as to the other, and surcharged the executors with \$20,000.

Lee L. Ottaway for Florence B. Mead, appellant and respondent.

Robert H. Wilson for William E. Hallock et al., respondents and appellants.

H. C. Storck and *George A. McLaughlin* for respondents.

Order affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

UNited STATES FIDELITY AND GUARANTY COMPANY,
Respondent, v. CARNEGIE TRUST COMPANY, Appellant.

U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., 177 App. Div. 176, affirmed.

(Submitted October 1, 1917; decided October 16, 1917.)

APPEAL from a judgment entered April 10, 1917, upon an order of the Appellate Division of the Supreme

Court in the first judicial department, which affirmed an order of Special Term granting a motion by plaintiff for a judgment in its favor upon the pleadings. Defendant was a depository of the funds of estates in bankruptcy and as required by statute had given a bond for the safe custody of the deposits. The plaintiff was the surety upon this bond. When the bond was issued the Carnegie Trust Company executed a written agreement of indemnity to the plaintiff to save it harmless from loss and to reimburse it for payments made by reason of the obligation of the bond. The trust company closed its doors and effort was made to recover by priority claim the funds of the estates in bankruptcy *in toto*, but the attempt failed and preference was denied. The bankruptcy creditors then filed general unsecured claims for the full amount of the deposits. Action by the bankruptcy creditors against the plaintiff followed and the plaintiff paid the obligation of its bond with interest. Thereafter the plaintiff offered for filing a claim against the assets of the Carnegie Trust Company in liquidation for reimbursement for the payment thus made. The plaintiff founded its claim upon the indemnity agreement. The defendant rejected the claim. Upon these facts the plaintiff sued to sustain the validity of the claim. The defendant, answering, denied the claim to be a valid one and alleged separately that dividends totalling thirty-five per cent had been paid to general unsecured creditors of the Carnegie Trust Company including the claims of the bankruptcy creditors for whom the plaintiff was surety.

Samuel S. Koenig and Oliver L. Goldsmith for appellant.

William J. McArthur and Leonidas Dennis for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and McLAUGHLIN, JJ. Dissenting: CRANE, J.

FRANCIS GILBERT, as Assignee of ALESSANDRO BOLOGNESI et al., Doing Business as A. BOLOGNESI & Co., Appellant, v. THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Respondent.

Gilbert v. Mechanics & Metals Nat. Bank of N. Y., 176 App. Div. 915, affirmed.

(Argued October 2, 1917; decided October 16, 1917.)

APPEAL from a judgment entered March 5, 1917, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed an order of Special Term granting a motion by defendant for judgment in its favor upon the pleadings. This action was instituted by the plaintiff as general assignee for the benefit of the creditors of the firm of A. Bolognesi & Co., to recover of the defendant the sum of \$33,707.10, representing a balance in the account of A. Bolognesi & Co. with the defendant on the date of the making of the general assignment to the plaintiff. The defendant interposed an answer containing among others a defense the substance of which is that on March 12, 1914 (following the assignment to the plaintiff), a petition in bankruptcy was filed against the firm of A. Bolognesi & Co. in the United States District Court, Southern District of New York, and that thereafter the said firm was adjudicated a bankrupt and that still later, Francis Gilbert (the plaintiff), Philip Termini and Leo Oppenheimer were duly elected trustees in bankruptcy of said A. Bolognesi & Co., and that by an order made on November 5, 1915, the assignee was directed to turn over to the trustees all the assets remaining in his hands, after making certain payments therein set forth, and that, therefore, the trustees in bankruptcy are now the sole owners and holders of the alleged cause of action set forth in the complaint and the real parties in interest, and the only persons authorized to prosecute this action. The plaintiff served a reply to this alleged defense,

admitting the filing of the petition in bankruptcy, the election of the three trustees and the making of the order of November 5, 1915, but denying that the trustees are the only persons authorized to prosecute this action.

Irving L. Ernst for appellant.

Frank M. Patterson and *Franklin H. Mills* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN and CRANE, JJ. Not voting: CARDODOZ and McLAUGHLIN, JJ.

HAROLD A. HOWARD et al., as Trustees under the Will of SARAH J. HOWARD, Deceased, Respondents, v. MAXWELL-BRISCOE MOTOR COMPANY, Appellant.

Howard v. Maxwell-Briscoe Motor Co., 177 App. Div. 918, affirmed.
(Argued October 2, 1917; decided October 16, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 23, 1917, which affirmed an order of Special Term denying a motion by defendant for judgment in its favor upon the pleadings. The complaint alleged that on or about December 10, 1909, the Maxwell-Briscoe Chicago Company, a corporation, hereafter referred to as the Chicago Company, entered into a lease with the plaintiffs by which it leased from the plaintiffs certain premises in the city of Chicago at a designated rental; that part of the consideration for the lease was the guaranty by this defendant, Maxwell-Briscoe Motor Company, of the payment of the rent; that default was made in the payment of rent by the Chicago Company on June 10, 1913; that on or about June 27, 1913, the Chicago Company, under its then

name of United Motor Chicago Company, was adjudicated a bankrupt; and that on the 11th day of July, 1913, it ceased to occupy and abandoned the premises. The premises were thereupon repossessed by the plaintiffs. It is alleged that by reason of the above facts the defendant, Maxwell-Briscoe Motor Company, as guarantor of the lease, became liable for an alleged balance of accrued rent and for other sums claimed by the plaintiffs to be due under the lease. The amended answer admitted the allegations of the complaint relative to the making of the lease and guaranty, but denied the allegation that any sum of money is due from the defendant to the plaintiffs, and set up two separate defenses in bar of the plaintiffs' alleged cause of action, based on (1) orders in the Federal court in receivership proceedings against the defendant and others whereby the purchaser of assets of the defendant was empowered to reject all executory contracts of the defendant; (2) receivership proceedings in the Federal court in which the affairs of the defendant were liquidated and its assets sold and distributed among its creditors.

The following question was certified: "Is the defendant entitled to judgment upon the pleadings?"

Donald C. Muhleman, Henry V. Poor and Thomas F. Dougherty for appellant.

F. Leon Shelp and Harrison E. Persons for respondents.

Order affirmed, with costs, and question certified answered in the negative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

**In the Matter of the Application of the PUBLIC SERVICE
COMMISSION FOR THE FIRST DISTRICT OF THE STATE
OF NEW YORK Relative to Acquiring Title to Lands
Required for Construction of the Lexington Avenue
Rapid Transit Railroad.**

**THE EBLING COMPANY, Appellant; THE CITY OF NEW
YORK, Respondent.**

Matter of Public Service Commission (Lexington Ave. R. Tr. R. R.),
174 App. Div. 865, affirmed.

(Argued October 2, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 23, 1916, which affirmed an order of Special Term confirming the report of commissioners of appraisal in condemnation proceedings. Part only of appellant's land was taken and it complained that the commissioners of appraisal failed to include any sum for the consequential damage to the portion of the property not taken.

Eugene Cohn for appellant.

*Lamar Hardy, Corporation Counsel (Charles J. Nehrbas
and Terence Farley of counsel)* for respondent.

Order affirmed, with costs, no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
CARDOZO and CRANE, JJ. Not sitting: McLAUGHLIN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK CENTRAL RAILROAD COMPANY, Appellant, v. MORRIS BLOCK, Assessor of the City of Kingston, Respondent.

THE ULSTER AND DELAWARE RAILROAD COMPANY, Respondent.

People ex rel. N. Y. C. R. R. Co. v. Block, 178 App. Div. 251, appeal dismissed.

(Submitted October 5, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 22, 1917, which affirmed an order of Special Term permitting the Ulster and Delaware Railroad Company to intervene in a certiorari proceeding to review the assessment of the New York Central Railroad Company in the city of Kingston.

Amos Van Etten for appellant.

William D. Brinnier, Corporation Counsel, for Morris Block, respondent.

A. T. Clearwater for Ulster and Delaware Railroad Company, respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDozo, McLAUGHLIN and CRANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. GERTRUDE STARK, Appellant.

People v. Stark, 172 App. Div. 967, appeal dismissed.

(Submitted October 10, 1917; decided October 16, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 28, 1916, which affirmed a judgment of

the Court of Special Sessions of the city of New York convicting the defendant of unlawfully practicing medicine.

Henry C. Neuwirth for appellant.

Harry E. Lewis, District Attorney (Harry G. Anderson of counsel), for respondent.

Appeal dismissed on argument.

GEORGE F. GROSS, an Infant, by JOHN F. GROSS, His Guardian ad Litem, Appellant, v. ERIE RAILROAD COMPANY, Respondent.

Gross v. Erie R. R. Co., 177 App. Div. 901, appeal dismissed.

(Submitted October 5, 1917; decided October 16, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered February 21, 1917, which affirmed an order of Special Term denying a motion made by the plaintiff for an order substituting Emma Gross as guardian *ad litem* for the plaintiff and vacating and setting aside the judgment entered in the above action on the 31st day of October, 1907, on an offer and acceptance for \$100, and vacating and setting aside the satisfaction thereof, filed January 16, 1908, and amending the complaint in said action, and substituting Edward J. McCrossin as attorney for the plaintiff in the place and stead of John F. Halstead upon the ground that the plaintiff has a meritorious cause of action against the defendant, that his rights were not properly protected and that the settlement was made by the guardian *ad litem* without authority.

Thomas Downs and Edward J. McCrossin for appellant.

Philip A. Rorty for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.

**LEON LAWTON, Respondent, v. BERNARD J. FARRELL,
Appellant.**

Lawton v. Farrell, 178 App. Div. 376, affirmed.

(Argued October 3, 1917; decided October 23, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 8, 1917, which affirmed an order of Special Term denying a motion for a change of venue in an action for false imprisonment. The plaintiff was a resident of Schoharie county, and the defendant was a detective, connected with the department of public safety of the city of Troy and resided in the county of Rensselaer. The complaint alleged that on the 8th day of July, 1914, a warrant was issued by the police magistrate of the city of Troy for the arrest of the defendant, in a bastardy proceeding, and that on the 8th day of August, 1914, the plaintiff was arrested by the defendant under such warrant in the county of Schoharie. It is alleged that the defendant, after making such arrest, failed to arraign the plaintiff before a magistrate in the county of Schoharie in violation of the provisions of sections 844, 845 and 846 of the Code of Criminal Procedure, and that plaintiff was thereby deprived of the right to execute one of the two undertakings provided for in said sections. It is further alleged that the defendant brought the plaintiff before a police justice of the city of Troy, before whom he was subsequently tried and convicted and imprisoned. He was thereafter discharged on habeas corpus. Defendant claimed that he was a municipal officer of the city of Troy and entitled as a matter of right to have the issues tried in Rensselaer county.

The following question was certified: "Whether on the facts shown by the record herein, the defendant is entitled to have an order changing the place of trial of the above entitled action from the county of Schoharie to the county of Rensselaer."

Thomas H. Guy for appellant.

Wallace H. Sidney for respondent.

Order affirmed, with costs, and question certified answered in the negative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THOMAS J. RIORDAN, Appellant, v. CHARLES L. FELDMAN et al., Constituting the MUNICIPAL CIVIL SERVICE COMMISSION OF THE CITY OF BUFFALO, Respondents.

People ex rel. Kennedy v. Feldman, 179 App. Div. 295, affirmed.
(Argued October 3, 1917; decided October 23, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 3, 1917, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendants to accept relator's application and permit him to enter and take part in a certain examination for the position of captain in the police department of the city of Buffalo, to be held by said commission, and rate his merit and fitness pursuant to law and certify his name if found eligible for promotion as a result of such examination. The application for a writ was opposed on the grounds: 1. That rule 29 of the municipal civil service rules, regulating promotions in the civil service of the city of Buffalo, provided that promotions in the police department must be made from among those employed for a period of at least twelve months immediately preceding the examination, "in the next lower position, the duties of which are such as would naturally and properly tend to fit him to perform the duties of the position to which he seeks

promotion," and that said relator, Thomas J. Riordan, had not in fact served in and was not occupying such a position.

Paul J. Batt for appellant.

Charles L. Feldman for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDZOZO,
McLAUGHLIN and CRANE, JJ. Not voting: HOGAN, J.

**COUNTY OF ERIE, Respondent, v. TOWN OF TONAWANDA,
Appellant.**

County of Erie v. Town of Tonawanda, 176 App. Div. 942, affirmed.
(Argued October 3, 1917; decided October 23, 1917.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 10, 1917, which affirmed an order of Special Term overruling a demurrer to the complaint. The plaintiff sought to recover from the defendant the amount of certain moneys alleged to have been erroneously paid to defendant upon a distribution of certain moneys collected for bank taxes on the stock of a bank located in the city of Tonawanda. The defendant demurred to the complaint on the ground: *First*, that the plaintiff was not the real party in interest, and, therefore, had no legal capacity to sue for the recovery of any of this money in that on the face of the complaint the money in question belonged to the city of Tonawanda and not to the plaintiff, and *second*, that the complaint did not state facts sufficient to constitute a cause of action.

The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

Paul J. Batt and V. H. Riordan for appellant.

Carleton H. White and Asher B. Emery for respondent.

Order affirmed, with costs, and question certified answered in the affirmative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

In the Matter of the Accounting of JOSEPH W. BEWSHER,
as Trustee under the Will of WILLIAM H. WATSON,
Sr., Deceased.

ALBANY GUARDIAN SOCIETY AND HOME FOR THE FRIENDLESS, Appellant; FREDERICK C. WATSON, Individually and as Administrator of the Estate of BERTHA C. WATSON, Deceased, et al., Respondents.

Matter of Bewsher, 178 App. Div. 381, affirmed.

(Argued October 3, 1917; decided October 23, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 4, 1917, which affirmed a decree of the Albany County Surrogate's Court, which adjudged that the bequest in the will of William H. Watson, Sr., deceased, to the Albany Guardian Society and Home for the Friendless was invalid and passed to the testator's next of kin for the reason that the will was made less than two months prior to the testator's death and hence the bequest was in contravention of section 6 of chapter 319 of the Laws of 1848 as amended by chapter 623 of the Laws of 1903.

A. Page Smith for appellant.

Frank R. Keeshan and George I. Sleicher for respondents.

Order affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

In the Matter of the Application of J. B. GREENHUT & COMPANY, Appellant, for the Return of Securities Deposited with the SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, Respondent.

Matter of Greenhut & Co., 178 App. Div. 895, affirmed.
(Argued October 4, 1917; decided October 23, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 27, 1917, which affirmed an order of Special Term which denied the petitioner's application for an order authorizing and directing the superintendent of banks of the state of New York to return and deliver to the petitioner certain securities of the value of \$5,000 theretofore deposited with the superintendent of banks by the petitioner, pursuant to the provisions of chapter 369 of the Laws of 1914, said order to be conditioned upon the surrender to the superintendent by the petitioner of the sum of \$10,442 alleged to be the entire amount of the deposits remaining in the hands of the petitioner. The order further required the petitioner to surrender to the superintendent deposits aggregating approximately \$44,609.42 as a condition precedent to the delivery by him of such securities to the petitioner. The superintendent of banks opposed the application on the ground that the said \$10,442 did not constitute all of the uncalled for deposits of the petitioner, but that certain other deposits aggregating \$34,167 or thereabouts should be surrendered.

Joseph M. Hartfield for appellant.

Merton E. Lewis, Attorney-General (*Robert S. Conklin* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
C. ROCKLAND TYNG, Appellant, v. WILLIAM A.
PRENDERGAST, as Comptroller of the City of New
York, et al., Respondents.

People ex rel. Tyng v. Prendergast, 178 App. Div. 895, affirmed.
(Argued October 4, 1917; decided October 23, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 8, 1917, which affirmed an order of Special Term denying a motion for a writ of mandamus to compel the board of taxes and assessments of the city of New York to prepare a payroll for the month of May, 1916, placing thereon the relator's salary as secretary of the said board of taxes and assessments, at the rate of \$4,500 per annum; the board of civil service commissioners of said city to certify the said payroll, and the comptroller of the said city to pay to this relator the said salary. The relator is a veteran of the Civil War, being an honorably discharged soldier of the United States army. In June 1911, his salary as secretary to the board of taxes and assessments of the city of New York was fixed at \$4,500. In the budget for the year 1916 his salary was reduced to \$3,500.

Robert L. Luce for appellant.

— *Lamar Hardy*, Corporation Counsel (*Terence Farley* of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

Rosanna Woods et al., Respondents, v. TUPPER LAKE CHEMICAL COMPANY et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Woods v. Tupper Lake Chemical Co., 178 App. Div. 942, affirmed.
(Argued October 4, 1917; decided October 23, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 15, 1917, affirming an award of the state industrial commission under the Workmen's Compensation Law. The Tupper Lake Chemical Company is a corporation engaged in the business of manufacturing wood alcohol, acetate of lime and charcoal and in its business operated steel retorts or ovens. While the husband of claimant was in the plant of the chemical company on March 4, 1916, to weld retort No. 2, retort No. 3 exploded while he was passing it, killing him instantly. The defendants contended that deceased was not an employee of the company but was a member of a firm which had contracted to do certain work for it and that the deceased was killed while in the performance of that work.

P. C. Dugan for appellants.

Merton E. Lewis, Attorney-General (E. C. Aiken of counsel) for respondents.

Order affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, HOGAN and CRANE, JJ.;
Dissenting: HISCOCK, Ch. J., CARDENZO and McLAUGHLIN, JJ.

**In the Matter of the Application of JULIA H. BRONSON,
as Executrix of FREDERICK S. BRONSON, Appellant,
for the Appraisal of Stock in the GENEVA TELEPHONE
COMPANY, Respondent.**

Matter of Bronson, 177 App. Div. 374, affirmed.

(Argued October 5, 1917; decided October 23, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 31, 1917, which reversed an order of Special Term granting an application for the appointment of appraisers under the provisions of section 17 of the Stock Corporation Law. The petitioner owned twenty-six shares of the capital stock of the Geneva Telephone Company. The sale of the physical property of the said company to the Federal Telephone and Telegraph Company was authorized at a stockholders' meeting of said Geneva Telephone Company held on January 31, 1916, by a vote representing more than three-fifths of the stock. At said meeting a notice on behalf of the petitioner was served demanding payment for the stock owned by petitioner in accordance with the provisions of section 17 of the Stock Corporation Law. Both the Geneva Telephone Company and the Federal Telephone and Telegraph Company were incorporated under the Transportation Corporations Law and subsequent to its enactment in 1890. The transfer of the property from the Geneva Telephone Company to the Federal Telephone and Telegraph Company was made under the authority of section 104 of the Transportation Corporations Law. Respondent contended that section 17 of the Stock Corporation Law had no application whatever to the situation.

Arthur J. Hammond for appellant.

Edward H. Letchworth for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
CARDOZO, McLAUGHLIN and CRANE, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
JOSEPH PECORARO, Respondent.**

People v. Pecoraro, 177 App. Div. 803, affirmed.

(Argued October 8, 1917; decided October 23, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 11, 1917, which reversed a judgment of the Westchester County Court, rendered upon a verdict convicting the defendant of the crime of abduction, and granted a new trial. The Appellate Division held that the exceptions to the refusal of the trial court to permit a preliminary trial of the issue as to whether or not a confession of the defendant, offered in evidence, was a voluntary, legal confession and to the admission in evidence of the confession without such preliminary examination, presented reversible error.

Lee Parsons Davis, District Attorney (Thomas A. McKennell of counsel), for appellant.

Humphrey J. Lynch for respondent.

Judgment affirmed; no opinion.

Concur: CHASE, CUDDEBACK, HOGAN, POUND and ANDREWS, JJ. Dissenting: HISCOCK, Ch. J., and McLAUGHLIN, J.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. SALVATORE F. SELLARO, Appellant.**

People v. Sellaro, 178 App. Div. 27, affirmed.

(Argued October 8, 1917; decided October 23, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 18, 1917, which affirmed a judgment of the Court of Special Sessions of the city of New York, convicting the defendant of a violation of section 124 of

the Sanitary Code in that the said defendant, on the 8th day of March, 1916, at the city of New York in the county of New York, unlawfully did have in his possession with intent to sell, offer for sale, give away, deal in and supply, certain medicinal preparations, intended for human use, which then and there contained wood naphtha, otherwise known as wood alcohol or methol alcohol.

Hyacinthe Ringrose for appellant.

Lamar Hardy, Corporation Counsel (Terence Farley and Leon N. Futter of counsel), for respondent.

Judgment affirmed, no opinion.

Concur: **HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.**

AUSTIN D. LORD et al., Copartners under the Firm Name of **LORD & HEWLETT**, Appellants, v. THE CITY OF NEW YORK, Respondent.

Lord v. City of New York, 171 App. Div. 140, affirmed.
(Argued October 8, 1917; decided October 23, 1917.)

APPEAL from a judgment entered March 23, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon a verdict directed by the court upon the first cause of action set forth in their complaint and dismissing the complaint as to it. Also appeal, by permission, from such judgment in so far as it affirms the judgment of the Trial Term dismissing the second cause of action set forth in the complaint. The action was to recover upon a contract for services in preparing plans and specifications for a court house and municipal building in the borough of Brooklyn. The defendant contended that the estimated cost based on

the plans and specifications prepared, instead of being well within the total appropriation, exceeded it by \$2,800,000 and that by reason thereof the plaintiffs failed to bring themselves within the terms of their employment and could not recover.

Jeremiah T. Mahoney, Robert F. Wagner and Vincent L. Leibell for appellants.

Lamar Hardy, Corporation Counsel (Terence Farley and E. Crosby Kindleberger of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

JOHN T. GALLAGHER, Respondent, v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Appellant.

Gallagher v. Fidelity & Casualty Co., 163 App. Div. 556, affirmed.
(Argued October 9, 1917; decided October 23, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 6, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action upon a policy of accident insurance. Plaintiff sustained a sun-stroke resulting in disability for a period of weeks for which he claimed indemnity under the policy. Defendant contended that plaintiff failed to show that the sunstroke was "suffered through accidental means" within the meaning of the policy.

Edwin A. Jones for appellant.

James F. Lynch for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.

THOMAS H. BALL, Appellant, v. JULIAN M. GERARD et al., Respondents, Impleaded with Others.

Ball v. Gerard, 160 App. Div. 619, affirmed.

(Argued October 9, 1917; decided October 23, 1917.)

APPEAL from a judgment entered March 4, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of Special Term denying a motion by defendants, respondents, for judgment in their favor upon the pleadings and directed a dismissal of the complaint. The action was for false representations alleged to have been fraudulently made by the said defendants and others in a prospectus whereby the plaintiff was induced to enter into a subscription contract by which he bought and agreed to pay for stock of a mining company. The answer interposed a general denial and as an additional defense set up the Statute of Limitations.

Frederick H. Sanborn for appellant.

John M. Bowers and Latham G. Reed for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.

STANISLAUS DE RIDDER, as Administrator of the Estate of GUILLAUME REUSENS, Respondent, v. JULIAN M. GERARD et al., Appellants, Impleaded with Others.

Reusens v. Gerard, 160 App. Div. 625, affirmed.

(Argued October 9, 1917; decided October 23, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 13, 1914, which affirmed an order of Special Term denying a motion by defendants, respondents, for judgment in their favor upon the pleadings in

an action for damages for deceit or false representations alleged to have been fraudulently made by the said defendants and others in a prospectus whereby it is alleged the plaintiff entered into an underwriting subscription contract by which he subscribed for and bought certain shares of stock. The answer set up, among other defenses, the Statute of Limitations.

The following questions were certified: "(1) Were all the plaintiff's damages included in one cause of action arising from the original delivery of the circular and alleged false representations made in November, 1906? (2) Upon the complaint, answer and reply was the claim of the plaintiff barred by the Statute of Limitations? (3) Did the complaint state facts sufficient to constitute a cause of action?"

John M. Bowers and Latham G. Reed for appellants.

Frederick H. Sanborn for respondent.

Order affirmed, with costs, and questions certified answered as follows: Second question in the negative so far as concerns the cause of action to recover damages on account of stock purchased in open market, and in affirmative so far as concerns cause of action based on subscription agreement; third question in the affirmative; first question not answered; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, POUND, McLAUGHLIN and ANDREWS, JJ. Not voting: HOGAN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.*
CHARLES H. GAAB, Respondent.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
v. DAVID WALLACE, Respondent.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
v. HENRY WETZEL, Respondent.

(Submitted October 15, 1917; decided October 23, 1917.)

Motion for re-argument denied. (See 221 N. Y. 617.)

**THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
v. R. F. STEVENS COMPANY, INC., Respondent.**

(Submitted October 15, 1917; decided October 23, 1917.)

Motion for re-argument denied. (See 221 N. Y. 622.)

**IN THE MATTER OF JACOB ROUSS, an Attorney, Appellant.
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW
YORK, Respondent.**

(Submitted October 15, 1917; decided October 23, 1917.)

Motion for re-argument denied. Motion to amend remittitur granted to the extent of inserting the following recital: Upon the argument of this cause in the Court of Appeals, appellant's counsel presented the point that the decision of the Appellate Division involved a denial of appellant's rights under subdivision 1 of the 14th amendment to the Federal Constitution. (See 221 N. Y. 81.)

**In the Matter of THE NORTHERN BANK OF NEW YORK,
in Liquidation.**

**In the Matter of the Application by the SUPERINTENDENT
OF BANKS OF THE STATE OF NEW YORK.**

**In the Matter of the Claim of GIFFORD, HOBBS & BEARD,
Respondents.**

JOSEPH G. ROBIN, Appellant.

Matter of Northern Bank of N. Y. (Claim of Gifford, Hobbs & Beard)
175 App. Div. 892, appeals dismissed.

(Submitted October 15, 1917; decided October 23, 1917.)

**MOTION to dismiss appeals from an order of the
Appellate Division of the Supreme Court in the first**

judicial department entered October 20, 1916, which affirmed an order of Special Term confirming the report of a referee to whom had been referred the claim of the respondents for legal services and also affirming an order of Special Term denying a motion to vacate said report.

The motion was made upon the ground of failure to file the required undertaking.

Charles N. Flint for motion.

No one opposed.

Motion granted and appeal dismissed, with costs in each appeal and ten dollars costs of motion.

In the Matter of the Application of LEONORA C. EDELSTEN, Appellant, for an Order Vacating and Setting Aside a Decree Admitting to Probate the Will of ELIZA F. W. CLAPP, Deceased.

RUSSELL A. CLAPP et al., Respondents.

Matter of Clapp, 177 App. Div. 887, appeal dismissed.
(Submitted October 15, 1917; decided October 23, 1917.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 16, 1917, which affirmed an order of the New York County Surrogate's Court denying a motion to vacate and set aside a decree admitting to probate the will of Eliza F. W. Clapp, deceased.

H. Louis Jacobson for motion.

No one opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

**DANIEL F. STROBEL, Respondent, v. JOHN PIERCE,
Appellant.**

Strobel v. Pierce, 164 App. Div. 910, affirmed.

(Submitted October 10, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 14, 1914, modifying and affirming as modified a judgment in favor of plaintiff entered upon the report of a referee. The plaintiff brings his action to recover damages for an alleged breach of contract for the sale and shipment of stone by the defendant. The theory of the plaintiff's action is that the stone was not furnished on time and when required, and that thereby the work of building a road by plaintiff under his contract with the state was delayed and the plaintiff suffered consequential damage by way of additional expense in the construction of the road under the contract with the state, in that the plaintiff had to pay his workmen on the road more money than he otherwise would pay, and by way of loss of interest in not receiving from the state the contract price, and that the completion of the road was postponed beyond the time when by the contract it was provided it should be done.

A. M. Mills for appellant.

George W. Ward for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. ALBERT GREEN, Appellant.**

People v. Green, 172 App. Div. 967, affirmed.

(Submitted October 10, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department,

entered March 4, 1916, which affirmed a judgment of the Kings County Court, rendered upon a verdict convicting the defendant of the crime of compulsory prostitution of women.

Luke O'Reilly for appellant.

Harry E. Lewis, District Attorney (*Ralph E. Hemstreet* of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: **HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.**

**THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
v. JOHN E. SCUDDER, Respondent.**

People v. Scudder, 177 App. Div. 225, affirmed.

(Argued October 10, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 2, 1917, which reversed a judgment of the Delaware County Court rendered upon a verdict convicting the defendant of the crime of grand larceny in the first degree.

Charles R. O'Connor and *Hamilton J. Hewitt* for appellant.

Alexander Neish for respondent.

Judgment affirmed; no opinion.

Concur: **HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.**

THE CITY OF NEW YORK, Respondent, v. WILLIAM R. HEARST, as President of the NATIONAL ASSOCIATION OF DEMOCRATIC CLUBS, Appellant.

City of New York v. Hearst, 165 App. Div. 911, affirmed.
(Argued October 11, 1917; decided October 30, 1917.)

APPEAL from a judgment, entered December 9, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment in favor of plaintiff upon the verdict. During a display of fireworks in Madison Square, managed and conducted by the Pain Manufacturing Company, which had been employed for that purpose by the National Association of Democratic Clubs, some of the fireworks exploded and, as a result of the explosion, one Dennis Shea, a police officer, was killed. His administratrix thereafter commenced an action against the city of New York to recover damages. A notice was thereupon served upon this defendant requiring him to defend the action. He having failed to do so, the city was obliged to defend. The trial resulted in a verdict for plaintiff which was subsequently affirmed by the Appellate Division and paid by the city. This action was brought to recover the amount paid.

Louis Marshall, Samuel Untermyer and William A. de Ford for appellant.

Lamar Hardy, Corporation Counsel (Terence Farley, William E. C. Mayer and Leon N. Futter of counsel), for respondent.

Judgment affirmed, with costs, on opinion of SCOTT, J., in *City of New York v. Hearst* (142 App. Div. 343).

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

**CREAM OF WHEAT COMPANY, Respondent, v. DANIEL E.
KNOWLTON, Appellant.**

Cream of Wheat Co. v. Knowlton, 162 App. Div. 936, affirmed.
(Argued October 12, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 4, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover the value of 253 cases of "Cream of Wheat" shipped by the plaintiff from Minneapolis to Buffalo and burned on the docks of the Western Transit Company, at a time when under a contract with the defendant these cases should have been stored in defendant's warehouse in the city of Buffalo. Defendant asserted his freedom from any negligence in failing to remove the boxes of Cream of Wheat prior to the fire, but insisted that even though he was negligent in failing to remove said boxes, such negligence imposed on him no liability for damages resulting to plaintiff, because any negligence in removing the Cream of Wheat was not the proximate cause of the injury to the goods. Furthermore, that there was no contract between plaintiff and defendant whereby defendant agreed to insure any goods that he was unable to place in his warehouse within forty-eight hours after their arrival and that there was no evidence which warranted a jury to so find.

Francis F. Baker for appellant.

H. W. Huntington and *Evan Hollister* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: **HISCOCK**, Ch. J., **CHASE**, **CUDDEBACK**, **HOGAN**, **POUND**, **McLAUGHLIN** and **ANDREWS**, JJ.

GARIBALDI REALTY AND CONSTRUCTION COMPANY, Appellant, v. GUISEPINA SANTANGELO et al., Respondents.

Garibaldi Realty & Construction Co. v. Santangelo, 164 App. Div. 513, affirmed.

(Submitted October 12, 1917; decided October 30, 1917.)

APPEAL from a judgment, entered November 28, 1914, upon an order of the Appellate Division of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing judgment in favor of defendants in an action to compel specific performance of a contract to convey real property. The judgment at Special Term directed specific performance without costs, but allowed an abatement of \$250 from the purchase price on account of an alleged deficiency in area, and ordered closing as of the date of the judgment. The Appellate Division made new findings in which it found that the plaintiff vendee was not entitled to any abatement as the deficiency was negligible, and ordered closing as of the original date, with costs to the defendant vendor in both courts.

J. Charles Weschler, Walter T. Kohn and Max Silverstein for appellant.

Alvin T. Sapinsky and Joseph Sapinsky for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.

ALSENS AMERICAN PORTLAND CEMENT WORKS, Respondent, v. NEW JERSEY DOCK AND BRIDGE BUILDING COMPANY, Appellant.

Alsens American Portland Cement Works v. New Jersey Dock & Bridge Building Co., 165 App. Div. 986, affirmed.

(Argued October 15, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1914, affirming a judgment in favor of plaintiff, entered upon the report of a referee, in an action to recover the value of certain Portland cement alleged to have been sold and delivered. Defendant alleged that it was a contractor engaged in construction work and had a contract for a particular piece of work; that the material delivered was not of the kind or quality suitable for the work for which it was ordered; that concrete made of it would not harden within a reasonable time; that it was rejected, and that plaintiff was notified of this and requested to remove it from the premises, and to furnish a cement suitable for the work.

Calvin D. Van Name for appellant.

Arthur A. Michell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

WILLIAM L. BOWES, Respondent, v. W. H. SMALL & COMPANY, Appellant.

Bowes v. Small & Company, 163 App. Div. 932, affirmed.

(Submitted October 15, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department,

entered May 15, 1914, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover an alleged loss caused by reason of a decline in the market price of seed sold to plaintiff by defendant. The complaint alleged in substance that the defendant agreed and undertook with plaintiff that it would stand one-half of any loss or depreciation in the market value of seed after the time of purchase. No fraud or mistake was alleged. The answer was a general denial and alleged that said sale was without any condition on the part of the defendant which it failed to perform.

Oscar J. Brown for appellant.

L. B. Williams for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

PAINTED POST LUMBER COMPANY, Respondent, v. HARRIS BARTH, Appellant, and JEANETTE F. SAXTON, Respondent, Impleaded with Others.

Painted Post Lumber Company v. Barth, 163 App. Div. 935, affirmed.
(Argued October 15, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 2, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien for lumber sold to the defendants Emanuel Miller and Mary A. Miller, and used by them in remodeling a building upon lands owned by said Millers under a contract for the purchase thereof of the defendant, appellant, Harris Barth. From a judgment foreclosing said mechanic's lien and adjudging that the interests of said Barth in the real property be first sold to satisfy

the plaintiff's claim and the costs and expenses of sale, the said Barth appealed.

James O. Sebring for appellant.

Warren J. Cheney and *Frank H. Hausner* for plaintiff, respondent.

Frank J. Saxton for defendant, respondent.

Judgment affirmed, with a separate bill of costs to each respondent appearing on the argument against appellant personally; no opinion.

Concur: *Hiscock*, Ch. J., *Collin*, *Cuddeback*, *Cardozo*, *Pound*, *Crane* and *Andrews*, JJ.

FRANK LAWRENCE, Respondent, v. STUYVESANT INSURANCE COMPANY, Appellant.

Lawrence v. Stuyvesant Insurance Company, 163 App. Div. 936, affirmed.

(Argued October 16, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 13, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action upon a "valued" policy of fire insurance. The answer set up as an affirmative defense: *First*. That at the time the plaintiff herein applied for insurance, he stated and represented that the automobile mentioned and described in the policy of insurance and which is the subject of the insurance had been purchased by him for the sum of \$1,750, and that its value was \$1,750; that such statements were made by him for the purpose of inducing defendant to believe that the said automobile at the time the application for insurance was made was worth at least \$1,500; that defendant believed the statements and relied upon them and issued the policy in suit for \$1,500; that such statements were false and were known

by the plaintiff to be false at the time he made them, and were made for the purpose of deceiving and misleading defendant, and did deceive and mislead defendant. *Second.* That subsequently to the fire alleged in the complaint, the plaintiff delivered to defendant a paper purporting to be a proof of loss signed and sworn to by him, wherein he said that the automobile was purchased by him for \$1,700 in January, 1910; that said statement was false, fraudulent and made by the plaintiff for the purpose of deceiving and misleading the defendant.

Herbert A. Hemingway for appellant.

Warren J. Cheney and Frank H. Hausner for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDODOZ, POUND, CRANE and ANDREWS, JJ.

UNITED STATES TRUST COMPANY OF NEW YORK,
Respondent, *v.* MARTINDALE REAL ESTATE COMPANY,
Appellant, Impleaded with Others.

U. S. Trust Co. of New York v. Martindale Real Estate Co., 166 App. Div. 920, affirmed.

(Argued October 16, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 29, 1915, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage upon real property. The defendant Martindale Real Estate Company contended that the action was prematurely brought in that the plaintiff, by the acceptance of interest from time to time since the due date of the mortgage, thereby extended the time of payment of the principal thereof to the respective succeeding interest dates and that no foreclosure action for non-payment

of principal could be brought during the intervening period. Specifically, its contention was that interest having been paid up to and including April 1, 1913, the time of payment of the principal was extended to the succeeding interest date, namely, October 1, 1913. The defendant offered no proof that the time of payment of the principal had been extended by any parol or written agreement or that any consideration had been paid for the extension claimed.

Franklin Bien for appellant.

H. K. Davenport and *Lewis G. Wallace* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: **HISCOCK**, Ch. J., **COLLIN**, **CUDDEBACK**, **CARDOZO**, **POUND**, **CRANE** and **ANDREWS**, JJ.

J. ROMAINE BROWN et al., as Executors of LOYAL L. SMITH, Deceased, Plaintiffs, v. CITY NATIONAL BANK OF PLATTSBURG, Respondent, and JONES BROTHERS COMPANY et al., Appellants, Impleaded with Others.

Brown v. City Nat. Bank of Plattsburg, 153 App. Div. 928, affirmed.
(Submitted October 16, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered February 6, 1913, modifying and affirming as modified a judgment entered upon a decision of the court at a Trial Term without a jury in an action of interpleader to determine the validity and priority of the claims of the several defendants. Plaintiffs entered into a contract with one Pennington for the erection of a mausoleum. Subsequently Pennington assigned all moneys due or to grow due under the contract to the defendant bank. Thereafter liens were filed by subcontractors and materialmen. It was admitted that the

amounts claimed were correct and the work and materials were actually furnished. The only question was as to the priority and validity of the claims as between the defendants. The several claimants having pressed the executors for payment and Jones Brothers Company having commenced foreclosure proceedings, the executors commenced this action of interpleader, bringing into court the amount which it was agreed remained unpaid of the original contract price for erecting the mausoleum.

John B. Riley and C. J. Vert for appellants.

J. S. Shedd for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

SHIPLEY CONSTRUCTION AND SUPPLY COMPANY, Appellant,
v. MARTIN MAGER et al., Respondents.

YORK MANUFACTURING COMPANY, Appellant, *v. MARTIN MAGER et al.*, Respondents.

Shipley Construction & Supply Co. v. Mager, 165 App. Div. 866, affirmed.

York Manufacturing Co. v. Mager, 165 App. Div. 872, affirmed.
(Submitted October 16, 1917; decided October 30, 1917.)

APPEAL, in each of the above-entitled actions, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 9, 1915, affirming a judgment in favor of defendants entered upon a verdict directed by the court in an action for conversion of certain machinery installed by plaintiff in a certain brewery under an alleged conditional contract of sale. The plaintiff contended that only part of the purchase price had been paid; that defendants had bought at foreclosure sale the real property of the brewing company upon which the machinery above mentioned

was erected and situate; that at such foreclosure sale and prior to the commencement of the bidding, the plaintiff caused a notice to be read apprising all present of the aforesaid conditional sale contract and that the plaintiff had the right to and did elect to remove the said machinery; that thereafter the plaintiff made an oral and written demand on the defendants for the same and that it was refused. The foreclosure action was based on a mortgage made and executed three years, lacking two months, before the conditional sale contract involved herein.

Jacob Landy and Herman W. Booth for appellant.

Joseph Rowan, Franklyn M. Silverstein and R. C. Cumming for respondents.

Judgment in each case affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

JOHN R. SHUART et al., Doing Business under the Name of JOHN R. SHUART & SONS, Respondents, v. ERIE RAILROAD COMPANY, Appellant.

Shuart v. Erie R. R. Co., 166 App. Div. 895, affirmed.
(Argued October 16, 1917; decided October 30, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 15, 1914, affirming a judgment in favor of plaintiffs entered upon a verdict in an action to recover for injury to certain horses through the alleged negligence of the defendant. Plaintiffs shipped the horses under a "live stock contract." On arrival of the car at its destination it was immediately placed in position at the cattle chute by defendant's employees. The plaintiffs were then on hand and proceeded to prepare the car for unloading; they opened the car door, put

down the bridge that connected the car with the chute, and proceeded with their work preparatory to taking the horses out of the car. Before any of the horses were removed from the car, it was accidentally moved by defendant, resulting in injury to five of the horses. One of the provisions of the live stock contract was to the effect that no claim for damages which might accrue to the shipper shall be allowed or paid by the carrier or sued for in any court, unless a claim for such loss or damage should be made in writing, verified by the affidavit of the shipper or his agent, and delivered within five days from the time the stock is removed from the car to some proper officer or agent of the defendant. It was admitted by plaintiffs that they never made out or delivered any paper or claim to defendant with respect to the damage to the horses.

Elbert N. Oakes, Thomas Watts and John Bright for appellant.

Frank Comesky for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

In the Matter of the Application of FERDINAND M. BECKER, Appellant, against EDWARD F. BOYLE et al., Constituting the Board of Elections of the City of New York, Respondents.

Constitutional law—Court of Appeals has no power to extend meaning of Constitution—Queens county—office of county clerk not required by Constitution to be filled at election in year 1917.

1. The Court of Appeals has no power to extend by a process of construction the plain meaning of the provisions of the State Constitution.

2. Section 1 of article 10 and section 3 of article 12 of the State Constitution, by their express terms, are not applicable to the county of Queens and do not require that the office of county clerk therein should be filled at the election in the year 1917.

Matter of Becker v. Boyle, 179 App. Div. 789, affirmed.

(Argued October 30, 1917; decided October 31, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 26, 1917, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the board of elections of the city of New York to receive and file a certificate of nomination as an independent candidate for the office of county clerk of Queens county and to have his name printed upon the ballot to be voted at the election to be held November 6, 1917. The present incumbent of that office was elected at the general election in 1915, and received a certificate of election for a term of three years commencing on January 1, 1916. The board of elections proceeded on the theory that the term of the present incumbent does not expire until the end of 1918, and consequently took no proceedings for the election of his successor at the coming general election. A certificate of independent nomination for the office was duly signed by the requisite numbers of electors of Queens county and presented to the board of elections on the last day fixed by law for the filing of such nominations, and such certificate was refused. The relator then applied for the peremptory writ of mandamus hereinbefore referred to.

Edgar F. Hazleton and Joseph B. Clark for appellant.

Lamar Hardy, Corporation Counsel (Terence Farley of counsel), for respondents.

Per Curiam. This appeal involves consideration of an application made by the petitioner for mandamus

requiring the respondents as a board of elections to place his name as that of an independent candidate for the office of county clerk of Queens county upon the ballot at the coming election. Relator's application is based upon the claim that the provisions of section 1, article 10, and section 3, article 12, of the Constitution require the election of county clerk in the county of Queens this year. Unless he is right in this contention his application has properly been denied.

Concededly, these provisions of the Constitution by their express terms are not applicable to the county of Queens and do not require that the office of county clerk therein should be filled at the coming election. We have no power to so extend by a process of construction the plain meaning of the provisions of the Constitution as to make them applicable to the selection of a county clerk in that county and we think, therefore, that the application has been properly denied, and the order appealed from should be affirmed, with costs.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ., concur.

Order affirmed.

In the Matter of the Application of WILLIAM E. SLEVIN,
Appellant.

LEOPOLD PRINCE, Respondent.

Matter of Slevin, 179 App. Div. 618, appeal dismissed.
(Argued October 30, 1917; decided November 1, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 24, 1917, which modified and affirmed as modified an order of Special Term denying the petition of the appellant herein that he be declared the lawfully elected nominee of the Democratic party for the office of justice of the Municipal Court of the city of New York for the

eighth district, borough of Manhattan. The question was as to whether certain ballots voted at a primary election were valid.

Denis O'L. Cohalan for appellant.

Charles Firestone and *Harry A. Gordon* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK,
HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Application of EDWARD A. RICHARDS
et al., Respondents.

HARRISON C. GLORE, Appellant.

In the Matter of the Application of HARRISON C. GLORE,
Appellant.

THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,
Respondent.

**Election Law — section 122 constitutional — Municipal Court
district in borough of Brooklyn a political subdivision.**

1. For the purposes of section 122 of the Election Law a Municipal Court district in the borough of Brooklyn is a political subdivision.
2. Section 122 of the Election Law, considered in its general application to the state, is not so unfair and unreasonable as to be unconstitutional.

Matter of Richards, 179 App. Div. 823, affirmed

Matter of Glore, 179 App. Div. 823, affirmed.

(Argued October 31, 1917; decided November 1, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 25, 1917, which affirmed an order of Special Term rejecting a purported certificate of nomination of appellant as an independent candidate for the office of justice of the Municipal Court in the borough of Brooklyn.

Edward A. Richards and Harrison C. Glore were the candidates of the Democratic and Republican parties, respectively, for the office of justice of the Municipal Court of the city of New York for the seventh district of Brooklyn. That office was to be voted for by the voters residing in the seventh Municipal Court district of the borough of Brooklyn. By a certificate of independent nomination, signed by 2,177 voters, Harrison C. Glore was designated as the candidate of the Fusion Committee party, a new organization. The respondent contends that the certificate should have been signed by at least 2,285 qualified voters, relying on the provisions of section 122 of the Election Law that five per cent of the number of votes cast for governor at the last gubernatorial election in the district are necessary for the making of an independent nomination. At the last gubernatorial election 45,700 votes were cast for governor in the district.

Benjamin Reass, Hugo Hirsh, Emanuel Newman and Max Leff for appellant.

Frank E. Johnson, Jr., and James A. Sheehan for Edward A. Richards et al., respondents.

Lamar Hardy, Corporation Counsel (George A. Green and Thomas F. Magner of counsel), for Board of Elections, respondent.

Per Curiam. We hold, *first*, that for the purposes of section 122 of the Election Law a Municipal Court district in the borough of Brooklyn is a political subdivision, and, *second*, that said section of the Election Law considered in its general application to the state is not so unfair or unreasonable as to be unconstitutional.

The order should be affirmed, with costs.

COLLIN, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ., concur; HISCOCK, Ch. J., not voting.

Order affirmed.

In the Matter of the Application of CHARLES J. MOORE,
Appellant, v. BOARD OF ELECTIONS OF THE CITY OF
NEW YORK, Respondent.

Matter of Moore v. Board of Elections, N. Y. City, 180 App. Div.
—, affirmed.

(Argued October 31, 1917; decided November 1, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 25, 1917, which reversed an order of Special Term granting an application for an order directing the board of elections of the city of New York to receive and file certificates of nomination of Charles J. Moore for the office of alderman in the fifty-eighth district of the city of New York and place his name upon the ballots as a candidate for such office.

The petitioner sought to file an independent certificate of nomination with the board of elections nominating him as candidate under the bull's eye emblem for the office of alderman of the fifty-eighth aldermanic district. This petition was rejected by the board of elections upon the ground that it did not contain a sufficient number of signatures.

Benjamin Reass for appellant.

Lamar Hardy, Corporation Counsel (George A. Green and Thomas F. Magner of counsel), for respondent.

Order affirmed, on authority of *Matter of Richards* (221 N. Y. 684).

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK,
HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Application of CHARLES B. BARFIELD, Appellant, v. THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, Respondent.

Matter of Barfield v. Board of Elections, N. Y. City, 180 App. Div. —, affirmed.

(Argued October 31, 1917; decided November 1, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 25, 1917, which reversed an order of Special Term granting an application for an order directing the board of elections of the city of New York to receive and file certificates of nomination of Charles B. Barfield for the office of member of assembly from the twenty-second district and place his name upon the ballots as candidate for such office. Mr. Barfield sought to file an independent certificate of nomination with the board of elections nominating him as candidate under the bull's eye emblem, for the office of member of assembly of the twenty-second assembly district, county of Kings. This petition was rejected by the board of elections upon the ground that it did not contain a sufficient number of signatures.

Benjamin Reass for appellant.

Lamar Hardy, Corporation Counsel (George A. Green and Thomas F. Magner of counsel), for respondent.

Order affirmed, with costs, on authority of *Matter of Richards* (221 N. Y. 684).

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Application of MAX GREENWALD,
Appellant, v. EDWARD F. BOYLE et al., Constituting
the Board of Elections of the City of New York,
Respondents.

Matter of Greenwald v. Boyle, 179 App. Div. 672, affirmed.
(Argued October 31, 1917; decided November 1, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 30, 1917, which affirmed an order of Special Term denying an application for a peremptory writ of mandamus to compel the board of elections of the city of New York to accept a certificate of nomination of Norbert Blank as an independent, candidate for the office of justice of the Municipal Court, second district, borough of The Bronx. The petition contained 2,209 signatures and was rejected by the board of elections upon the ground that that number was insufficient, it being contended that under section 122 of the Election Law at least 3,000 were required.

Norbert Blank for appellant.

Lamar Hardy, Corporation Counsel (Terence Farley of counsel), for respondents.

Order affirmed, with costs, on authority of *Matter of Richards* (221 N. Y. 684).

Concur: COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and ANDREWS, JJ. Concurs in result: Hiscock, Ch. J. Dissenting on the ground that so far as section 122 of the Election Law requires more than 1,500 signatures for an independent nomination in a subdivision of a county or a borough, it is unreasonable and void: POUND, J.

JOHN DOYLE, Appellant, v. ATLANTIC STEVEDORING COMPANY, Respondent.

Doyle v. Atlantic Stevedoring Co., 164 App. Div. 160, affirmed.
(Argued October 17, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 13, 1915, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. Plaintiff, while in the employ of defendant as a longshoreman, was engaged in stowing railroad rails in the hold of a steamship. The rails were lowered by certain of his co-employees by means of a sling containing three rails each. They were bound together by a chain sling and attached to a fall which lowered them into the hold where plaintiff and other co-employees unbound and stowed them. While one of the loads was being lowered, one of the links in the chain which bound up the rails broke, and one of them slid along the hold of the vessel and struck plaintiff's foot, inflicting injuries to recover damages for which this action was brought.

Bertrand L. Pettigrew for appellant.

John C. Robinson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK and ANDREWS, JJ. Dissenting: CARDOZO and POUND, JJ. Not sitting: CRANE, J.

ALEXANDER C. LA MOUTTE, Appellant, v. TITLE GUARANTY AND SURETY COMPANY, Respondent.

ALEXANDER C. LA MOUNT, Appellant, v. JANE FRANCKE, Respondent.

La Moutte v. Title Guaranty & Surety Co., 165 App. Div. 573, affirmed.

La Moutte v. Francke, 177 App. Div. 933, affirmed.

(Argued October 17, 1917; decided November 2, 1917.)

APPEAL in first above-entitled action from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 19, 1915, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury. Appeal in second above-entitled action from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 28, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury. Plaintiff and defendant Jane Francke were husband and wife, having two children of their marriage. A decree of separation had been made by the Supreme Court in New York county on March 30, 1908, by which the custody of the children was awarded to the wife. Subsequently, on July 27, 1911, the parties were divorced by a judgment entered in the District Court of Idaho. Thereafter the individual defendant married and assumed her present name. On July 8, 1911, plaintiff and defendant Mrs. Francke, desiring to change the situation in relation to the custody of their two children, entered into two agreements designated by them respectively "Contract A" and "Contract B," delivered to each other bonds for \$5,000 for the faithful performance of the agreements on their parts, respectively, and stipulated for and procured an amendment of the decree of March 30, 1908, so as to provide for an equal division of the custody of the two children, in conformity with the provisions of "Contract A" and "Contract B." The

actions are brought on the bond, and the breach of the contract relied upon by plaintiff is the conceded fact that in the summer of 1912 defendant Mrs. Francke took the two children upon a trip to Europe, being absent from the state about fifteen weeks, without notice, "Contract B" prohibiting either party from taking the children from the state of New York and "Contract A" providing for notice of any change of residence.

Charles A. Brodek for appellant.

Harvey D. Hinman for respondents.

Judgment in each case affirmed, with costs; no opinion.

Concur: **HISCOCK**, Ch. J., **COLLIN**, **CUDDEBACK**, **CARDOZO**, **POUND**, **CRANE** and **ANDREWS**, JJ.

HENRY P. NEUN, Appellant, *v.* **B. H. BACON COMPANY**, Respondent.

Neun v. Bacon Co., 166 App. Div. 971, affirmed.

(Argued October 17, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 5, 1915, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, in an action to recover for goods alleged to have been sold and delivered. The defense was the Statute of Limitations. Appellant contended that a certain letter received in evidence on the trial constituted such an acknowledgment of the alleged debt, and promise to pay it, as to take the claim out of the bar of the statute.

William F. Lynn for appellant.

Herbert J. Stull for respondent.

Judgment affirmed, with costs; no opinion.

Concur: **HISCOCK**, Ch. J., **COLLIN**, **CUDDEBACK**, **CARDOZO**, **POUND**, **CRANE** and **ANDREWS**, JJ.

THE SEAMEN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK, Respondent, *v.* J. HADLEY MCCOLLOUGH et al., Appellants.

Seamen's Bank for Savings v. Fell, 166 App. Div. 271, affirmed.
(Argued October 17, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 10, 1915, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose two mortgages on real property. In each case the mortgage bore interest at the rate of six per cent, and the borrower paid the recording fee and the recording tax. The only issue in the case was the question of law whether the contracts were usurious.

Agnes K. Murphy Mulligan and J. Hadley McCollough for appellants.

John Guyton Boston and George W. Wickersham for respondent.

Judgment affirmed, with costs, upon opinion of McLAUGHLIN, J., below.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDENZO, POUND, CRANE and ANDREWS, JJ.

JOSEPH KOEHNE, Respondent, *v.* HOTEL ASTOR, INC., Appellant.

Koehne v. Hotel Astor, Inc., 167 App. Div. 926, affirmed.
(Argued October 17, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 16, 1915, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover

for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Plaintiff was employed as a carpenter. Defendant maintained in its hotel a shop where its furniture and fixtures were repaired. The plaintiff sustained his injuries while boring a hole in a section of a table leg upon a boring machine. This section was about ten inches long. He testified that the drill which had penetrated the wood for a depth of six inches became caught, and as he pulled the work back the bed plate of the machine was pulled back out of the sockets and fell upon his foot. It was charged that defendant was negligent, *first*, in that no safety appliance was used to prevent the bed from leaving the sockets when it was pulled back, and *secondly*, in that the superintendent did not warn the plaintiff that the bed might come out and fall upon him when pulled back.

Theodore H. Lord, Lyman A. Spalding and John H. Jackson for appellant.

Otto Gillig and Charles Mailland Beattie for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

PLINY FISK et al., Copartners under the Firm Name of HARVEY FISK & SONS, Respondents, v. JAMES G. BATTERSON, Appellant.

Fisk v. Batterson, 165 App. Div. 952, affirmed.

(Argued October 17, 1917; decided November 2, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 8, 1915, reversing a judgment in favor of defendant entered upon a dismissal of the complaint

by the court at a Trial Term and granting a new trial. The action was brought to recover the price agreed to be paid for certain stock, alleged to have been subscribed for by defendant. The motion to dismiss was made upon the grounds that the plaintiffs had failed to prove facts constituting a cause of action, that the agreement was void under section 53 of the Stock Corporation Law because ten per cent had not been paid thereon in cash and that the plaintiffs were not proper parties plaintiff.

William J. Moran for appellant.

G. Sumner, Thomas D. Thacher and Leland B. Duer for respondents.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDENZO, POUND, CRANE and ANDREWS, JJ.

HARRIET E. HARING, Respondent, *v.* BROOKLYN HEIGHTS RAILROAD COMPANY et al., Appellants.

Haring v. Brooklyn Heights R. R. Co., 160 App. Div. 907, affirmed.
(Submitted October 18, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 7, 1914, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to remove a cloud on the title of the plaintiff's alleged property by setting aside and declaring null and void the sheriff's sale of said property to defendant Leggatt in satisfaction of a judgment of the defendant railroad against Edward B. Haring, the plaintiff's husband. It appeared that plain-

tiff gave to her husband certain money to pay part of the purchase price of the property in question; he procured the contract of sale in his own name, without authority from the plaintiff to do so, and without her knowledge; she never saw the contract, her husband having signed it for her without mentioning himself as representing her. On the day of the closing she delivered the balance of the purchase price to the lawyer drawing the deed. When he handed her the same she learned for the first time that her husband's name appeared as the grantee. To this she objected and insisted that as her money paid for the property, it should be in her name. Whereupon a new deed, from her husband to her, was executed and both deeds recorded at once. Upon the date of the conveyance the defendants had a judgment against the plaintiff's husband, Haring. It was their contention that this judgment became a lien upon the premises in question the instant the deed was made out in the name of the husband.

George D. Yeomans and *Mortimer B. Hoffman* for appellants.

John M. Gardner for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, CARDENZO,
POUND, CRANE and ANDREWS, JJ. Not sitting: COLLIN, J.

THOMAS F. SHEEDY, Respondent, v. WILLIAM G. FOSTER,
Defendant, MARIA FOSTER, Appellant, and NEAL D.
BECKER, as Executor of WILLIAM J. K. KENNY,
Deceased, Respondent, Impleaded with Another.

Sheedy v. Foster, 167 App. Div. 935, affirmed.

(Argued October 18, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division
of the Supreme Court in the second judicial department,

entered March 26, 1915, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. This action was commenced to foreclose a real property mortgage in the principal sum of \$35,000 given by the defendants William George Foster and his wife, Maria Foster, the present appellant, to William J. K. Kenny. Kenny assigned the mortgage soon after its execution to the plaintiff Sheedy, as collateral security for loans by Sheedy to Kenny in excess of the face amount of the mortgage. An absolute assignment of the mortgage was duly executed by Kenny and delivered to Sheedy and was duly recorded. The default alleged in the complaint upon which foreclosure of the mortgage was demanded was the failure of the defendant William George Foster to pay installments of interest due upon the mortgage. Appellant contended that the complaint failed to set forth a cause of action for two reasons: In that there was no allegation of election to deem the mortgage due to Kenny, a joint owner of the mortgage debt, because of the default in payment of interest and taxes; and in that the complaint did not set forth a demand upon Kenny or his executor, Becker, to become a party plaintiff, and failed to state why Kenny (later his executor, Becker) was joined, not as a plaintiff, but as a defendant.

Richard J. Kent and Harry Percy David for appellant.

Charles E. Kelley for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

**Iva M. Hart, Respondent, v. William E. McKeever,
Appellant.**

Hart v. Mc Keever, 166 App. Div. 968, affirmed.

(Submitted October 19, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 23, 1915, affirming a judgment in favor of plaintiff entered upon a verdict. This action was brought under the Employers' Liability Act to recover damages for injuries sustained by the plaintiff through the negligence of the defendant in failing to provide a safe, suitable and proper stove for her upon which to work; in failing to furnish a reasonably safe, suitable and proper place for her in which to work; and in failing to furnish proper means and appliances for doing her work. Plaintiff, while working as a cook for defendant, was burned through the tipping of a spider containing grease so that the grease caught fire. She contended that the accident was caused through defects in the stove furnished by the defendant for cooking.

George B. Dolsen and William F. Rafferty for appellant.

Myron S. Melvin for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND and CRANE, JJ. Not sitting: ANDREWS, J.

FRANK B. SHAFFER, Respondent, v. MOHAWK VALLEY BREWING CORPORATION, Appellant, Impleaded with Others.

Shaffer v. Murray, 166 App. Div. 944, affirmed.

(Argued October 19, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department,

entered January 15, 1915, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover upon a written contract for services as assistant manager of a brewery, terminable only upon sixty days' notice. The contract was executed by the three individual defendants and plaintiff entered upon the discharge of his duties. Thereafter the defendant corporation was incorporated and took over the business of the brewery. Nothing was said to plaintiff as to any new arrangement, and he continued in his employment until his discharge. The question was as to the liability of the defendant brewery corporation, depending on whether or not the plaintiff at the time of his discharge was employed pursuant to an adoption of the contract, alleged in the complaint, and entitled to sixty days' notice of discharge and his salary for that period of time. The contention of appellant was that he was properly discharged without notice and without additional pay.

Stuard G. Knigg and Charles G. Fryer for appellant.

Walter F. Wellman for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, CARDENZO,
POUND, CRANE and ANDREWS, JJ. Not voting: COLLIN, J.

HOLLAND LAUNDRY, Appellant, v. TRAVELERS INSURANCE COMPANY, Respondent.

Holland Laundry v. Travelers Ins. Co., 166 App. Div. 621, affirmed.
(Argued October 19, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 15, 1915, affirming a judgment in favor of defendant entered upon a verdict directed by the court. The action is to recover a sum of money claimed to be due under a policy of liability insurance as indem-

nity for loss sustained because of liability for an injury to an employee. The policy contained the following provision. "This agreement shall not apply * * * to any such injuries caused or sustained by any person employed by the assured in violation of law as to age or under the age of fourteen years if there is no legal age limit, or by any contract convict laborer." On the 25th day of March, 1910, an employee of the policy-holder, the plaintiff herein, named Henrietta Della Valle, accidentally sustained bodily injuries, to recover damages for which an action was brought, and a recovery was had upon the sole ground that the said employee was under the age of sixteen years and illegally employed by this plaintiff. Judgments were thereupon entered against this plaintiff amounting to the sum of \$5,704.99, which were paid by the plaintiff, who sued to recover such amount from this defendant, asserting that the loss so sustained was covered by the aforesaid policy of insurance.

Frederick W. Sparks for appellant.

Frank Verner Johnson and *William J. Moran* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *Hiscock*, Ch. J., *COLLIN*, *CUDDEBACK*, *CARDOZO*, *CRANE* and *ANDREWS*, JJ. Dissenting: *POUND*, J.

INTERBORO BREWING COMPANY, INCORPORATED, Appellant, *v.* WILLIAM F. DOYLE, Defendant, and JAMES A. ROBINSON, Individually and as Trustee, Respondent.

Interboro Brewing Co. v. Doyle, 165 App. Div. 646, affirmed.

(Submitted October 19, 1917; decided November 2, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department,

entered January 25, 1915, affirming a judgment in favor of defendant, respondent, entered upon the report of a referee. The action was brought in equity by the plaintiff against the defendants to redeem a pledge of certain bonds which the plaintiff had delivered to the defendant Doyle as security for a loan, upon an offer and tender to pay the balance due. The Metropolitan Dairy Company, a New York corporation, of which company defendant Doyle was treasurer and one of the directors, made an agreement with certain farmers at Colchester, N. Y., to open a creamery and to purchase milk, and as a part of this agreement it was provided that there should be pledged as a guaranty of the payment of the purchase price of the said milk certain bonds and that the same should be placed in the hands of defendant James A. Robinson, as trustee for that purpose. Under this agreement the aforesaid bonds, which were payable to bearer, had not matured and which were transferable by delivery, and which constitute the subject-matter of this action, were delivered by defendant William F. Doyle to defendant James A. Robinson, as such trustee under this pledge agreement, to be held by the said Robinson as a pledge to guarantee the payment to the said farmers of the purchase price of their milk so sold and delivered to the Metropolitan Dairy Company. The bonds in question continued in the possession of the defendant James A. Robinson as such trustee from March 14, 1912, until after January 15, 1914, the date on which the Metropolitan Dairy Company was adjudged a bankrupt. The referee held that the plaintiff was not entitled to the bonds as against the defendant.

George H. Porter for appellant.

A. G. Patterson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

FRED R. BUTTERFIELD, Respondent, v. THE STATE OF NEW YORK, Appellant.

State — filing of claim not equivalent to filing of notice of intention to file claim.

The filing of a claim against the state is not equivalent to the filing of the written notice of intention to file a claim provided for by section 264 of the Code of Civil Procedure. (*Curry v. City of Buffalo*, 135 N. Y. 366; *Buckles v. State of N. Y.*, 221 N. Y. 418, followed.)

Butterfield v. State of N. Y., 178 App. Div. 292, reversed.

(Argued October 9, 1917; decided November 13, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 8, 1917, which reversed a determination of the Court of Claims dismissing the claim of the respondent herein, and remitted the matter to said Court of Claims for further consideration. The Court of Claims dismissed the claim herein upon the ground that no proof was offered establishing the filing in the office of the clerk of the Board of Claims and with the attorney-general of a "notice of intention to file a claim" against the state pursuant to section 264 of the Code of Civil Procedure. That court refused to pass upon the contention by the claimant that it appeared from the evidence that the claim was filed within six months from the date it accrued. The Appellate Division in reversing the order of the Court of Claims held that the filing of the claim in the office of the clerk of the Court of Claims and in the office of the attorney-general within six months from the date when the claim accrued would be a substantial compliance with section 264 of the Code of Civil Procedure, although no "notice of intention to file a claim" against the state had been filed. The claim was, therefore, remitted to the Court of Claims for determination by that court of the date when the alleged damage accrued and proof of other facts alleged in the claim.

Merton E. Lewis, Attorney-General (Edmund H. Lewis of counsel), for appellant.

W. E. Young and W. Chase Young for respondent.

Per Curiam. The order appealed from should be reversed, and the determination of the Court of Claims affirmed, with costs in this court and in the Appellate Division, upon the authority of *Buckles v. State of New York* (221 N. Y. 418).

The filing of the claim itself, even within six months, is not equivalent to the filing of the written notice of intention to file a claim against the state provided for by section 264 of the Code of Civil Procedure. (*Curry v. City of Buffalo*, 135 N. Y. 366.)

HISCOCK, Ch. J., CHASE, CUDDEBACK, POUND, McLAUGHLIN and ANDREWS, JJ., concur; HOGAN, J., concurs in result.

Order reversed, etc.

LONDON FINANCE COMPANY, Appellant, v. JOHN L. SHATTUCK, Respondent.

London Finance Co. v. Shattuck, 166 App. Div. 922, affirmed.
(Argued October 17, 1917; decided November 13, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 2, 1915, which affirmed an order of Special Term vacating and setting aside a judgment by confession and an execution issued thereon, and declaring null and void all proceedings under the said judgment. The plaintiff is a corporation organized and existing under and by virtue of the laws of the state of Massachusetts. The respondent is an employee of the police department of the city of New York and a resident of the borough of Manhattan. On March 3, 1914, at the

office of the Star Finance Company, 39 West Thirty-fourth street, city of New York, defendant signed three papers, (1) an application for a loan of twenty-five dollars, addressed to the London Finance Company, 43 Tremont street, Boston, Mass.; (2) a note of the same date for twenty-seven dollars and fifty cents, bearing interest at the rate of three per cent per month, and (3) a confession of judgment. A few days subsequent to March 3, 1914, defendant received a check mailed from the city of Boston by the London Finance Company, which defendant cashed in the city of New York. No portion thereof was repaid. On or about the 11th day of August, 1914, judgment by confession was entered by the London Finance Company in the Supreme Court of Onondaga county for the sum of forty-three dollars and seventy cents; a transcript of said judgment was filed with the clerk of the county of New York and execution thereunder was issued against the defendant's salary. The Special Term set forth as its reason for vacating the judgment that it was apparent the contract was made in the state of New York and that the claim that it had been made in the state of Massachusetts was a mere subterfuge for the purpose of evading the usury laws of the state of New York.

Lionel L. P. Kristeller and Simon S. Hamburger for appellant.

John T. S. Wade and Leonard McGee for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, POUND and ANDREWS, JJ. Taking no part: CARDozo, J.

BASE BALL PLAYERS FRATERNITY, INC., Respondent, v.
BOSTON AMERICAN LEAGUE BASE BALL CLUB,
Appellant.

Base Ball Players' Fraternity, Inc., v. Boston American League Base Ball Club, 166 App. Div. 484, affirmed.

(Argued October 22, 1917; decided November 13, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 9, 1915, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial. One Hageman, plaintiff's assignor, signed a contract with the defendant as a baseball player for the season of 1912, beginning April fifteenth and ending October fifteenth, at a salary of \$400 per month. This contract was by its terms made subject to the conditions of the national agreement and of the rules of the national commission. Hageman duly reported to the defendant and performed the services agreed in said contract to be performed up to May 15, 1912, when he was transferred to the Jersey City team of the International league, temporarily or under what is known in baseball as an optional agreement. He reported to Jersey City, signed a contract, as he claimed he was compelled to under the rules of the national commission referred to in his contract with defendant, and performed the services required of him until June 23, 1912, when he was returned to the defendant by the Jersey City team. Thereupon defendant attempted to transfer Hageman to a Western league team at a smaller salary, which Hageman refused to accept. This action was brought to recover salary accruing under the contract after June 23, 1912. The defense was that Hageman by signing a contract with the Jersey City club terminated his contract with defendant.

John Conway Toole for appellant.

David L. Fultz for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and CRANE, JJ. Not sitting: McLAUGHLIN, J.

M. BEULAH GRISWOLD, Respondent, v. OTTO RINGLING et al., Defendants, and JOHN RINGLING, Appellant.

Griswold v. Ringling, 165 App. Div. 737, affirmed.

(Argued October 22, 1917; decided November 13, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 6, 1915, reversing a judgment in favor of defendant, appellant, entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial. The complaint alleged that the defendants conducted a circus known as the "Barnum & Bailey Circus;" that on May 21, 1910, the circus was brought to the city of Schenectady and tents were erected on the outskirts of the city; that fire took place and by reason of the negligence of the defendants the main tent was destroyed and the plaintiff, a spectator of the performance, was injured in the panic which ensued. It was further alleged and proved that defendants had provided no fire apparatus and that their servants and employees made no effort to extinguish the fire.

William Dewey Loucks for appellant.

Edgar T. Brackett and Charles G. Fryer for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

BLAKESLEE, PERRIN & DARLING, Respondent, v. OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Appellant.

Blakeslee, Perrin & Darling v. Ocean Accident & Guarantee Corporation, Ltd., 166 App. Div. 587, affirmed.

(Argued October 22, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 11, 1915, in favor of plaintiff upon the submission of a controversy under section 1279 of the Code of Civil Procedure. Defendant had issued to the plaintiff a policy of credit insurance. This policy insured the plaintiff "against actual loss to an amount not exceeding \$5,000 on such covered accounts as might be proved under the terms, conditions and limitations of (said) contract." Within the term of this contract the assured suffered a total loss upon an account owing by one Gouverneur E. Smith and Company to the amount of \$3,869.08, upon which account there was no salvage. It was conceded that all the preliminary requirements on the part of the assured have been fully met and the controversy presented was merely as to the amount which the defendant was liable to pay under this contract, on account of such loss.

William Burnet Wright, Jr., for appellant.

H. D. Blakeslee, Jr., for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

JOHN C. PRATT, as Trustee, Respondent, v. WILLIAM E. PRENTICE, Appellant.

Pratt v. Prentice, 186 App. Div. 906, affirmed.

(Argued October 22, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 10, 1914, affirming a judgment in favor of plaintiff entered upon a verdict in an action of ejectment. Defendant was in possession under a lease from the grantor which contained the following clause: "The party of the first part may sell from time to time any portion of the premises hereby leased and at the time of each and any such sales, second party agrees to vacate such portion or portions thereof and shall not claim or be entitled to receive any compensation for crops or otherwise." Upon appeal the question of law was presented whether a sale of the whole thirty-two acres by a single deed to plaintiff, a third party, operated to bring the term of the lease under which defendant held to a close and thus shortened the otherwise unexpired lease year.

George P. Decker and William E. Prentice for appellant.

George W. Watson and James L. Kelly for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

LARKIN COMPANY, Appellant, v. TERMINAL WAREHOUSE COMPANY, Respondent.

Larkin Co. v. Terminal Warehouse Co., 161 App. Div. 262, affirmed.
(Argued October 22, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered March 23, 1914, affirming a judgment in favor of defendant entered upon an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and directing a dismissal of the complaint. The action was brought by the plaintiff against the defendant, its landlord, to recover the sum of \$4,060 paid by the plaintiff to the estate of one William Grosser, an employee of the plaintiff, killed by falling from an elevator in a warehouse building owned by the defendant and leased to various tenants, of which the plaintiff was one, together with the fee paid by the plaintiff to its attorney in connection with said settlement. The ground alleged by the plaintiff for recovery against the defendant was that the elevator was negligently maintained by the defendant.

Paul Armitage and Henry D. Donnelly for appellant.

Bertrand L. Pettigrew and Walter L. Glenney for respondent.

Judgment affirmed, with costs, on opinion of LAUGHLIN, J., below.

Concur: HISCOCK, Ch. J., COLLIN, HOGAN and CARDOZO, JJ. Dissenting: CHASE, J. Not sitting: McLAUGHLIN, J.

CRANE, J. (dissenting). I cannot agree with the decision in this case and for the following reasons.

The defendant lessor having retained possession and control of the elevator in its loft building was bound to maintain it in a reasonably safe condition and comply with all ordinances and building regulations relating thereto. It is conceded that the elevator was improperly constructed and negligently maintained. In consequence an employee of the plaintiff, a tenant on the fourth floor, was killed. After action brought by the representatives of the deceased against the plaintiff for negligence in furnishing its servant with an unsafe place to work a settlement was made for a reasonable amount

which the employer seeks to recover in this action from its landlord whose negligence created the condition.

It is said that this plaintiff was *in pari delicto* and cannot recover. The lessee had no control over the elevator and could not reconstruct or repair it. The only wrong charged against it is in having leased the premises at all, knowing the conditions. This is not such a participation in the primary wrong as to make the tenant equally guilty in the landlord's neglect. The authorities support this statement.

The leading case gives the rule as follows: "Our law, however, does not in every case disallow an action, by one wrong-doer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendantis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offence. In respect to offences, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers." (*Lowell v. Boston & Lowell R. R. Corp.* 23 Pick. 32.)

This rule runs through all the cases, expressed in various ways. (*Mayor, etc., of New York v. Dimick*, 49 Hun, 241; *Washington Gas L. Co. v. Dist. of Col.*, 161 U. S. 316, 327; 6 R. C. L. p. 1054, 1055; *Dunn v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214; *Scott v. Curtis*, 195 N. Y. 424; *Churchill v. Holt*, 127 Mass. 165; *Oceanic S. N. Co. v. Compania T. E.*, 134 N. Y. 461.)

The plaintiff's complaint should not have been dismissed as sufficient facts appeared to warrant submission of the case to the jury.

**WILLIAM H. KING, Appellant, v. NATHANIEL D. CHAPIN,
Respondent.**

King v. Chapin, 168 App. Div. 914, affirmed.

(Argued October 22, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 3, 1915, affirming a judgment in favor of defendant entered upon a verdict. The action was brought to recover the second and last installment on the sale by plaintiff to defendant of certain shares of the capital stock of the corporation known as Billings, King & Company. The plaintiff claims to recover on two written agreements, namely, the original agreement of sale of January 25, 1911, and an agreement dated February 2, 1912, one year later, confirmatory thereof. As the first agreement constituted the basis of a perfect cause of action, it alone was pleaded. The second agreement was merely confirmatory of the first on this point. The defense was in substance an alleged oral agreement, made March 4, 1911, between the parties and intermediate these two written agreements, whereby defendant instead of paying plaintiff the last installment "might apply \$1,750 of the total sum of \$7,500," which he had agreed to pay plaintiff for said stock, towards the payment of the claims of creditors of the company; and that defendant had applied that sum in that way, by purchasing the claims of said creditors.

Alfred B. Cruikshank for appellant.

Albert Stickney for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and CRANE, JJ. Not sitting: McLAUGHLIN, J.

WALTER L. MIDDLEBROOK, Respondent, v. BOSTON AND MAINE RAILROAD, Appellant.

Middlebrook v. Boston & Maine R. R., 167 App. Div. 944, affirmed.
(Argued October 23, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 4, 1915, affirming a judgment in favor of plaintiff entered upon a verdict in an action under the Federal Employers' Liability Act to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant. The plaintiff, who was the yard conductor or conductor of the switcher crew working in the west yard at East Deerfield was riding on the east end of a coal car that was being pushed along track No. 6 in an easterly direction when this east end of the coal tar fouled or sideswiped cars standing at the east end of track No. 7. The coal car on which plaintiff was riding was forced over against a car standing on track No. 5, and while plaintiff was attempting to alight his leg was caught between the car and a car standing on No. 5 and he received the injuries complained of. At the conclusion of the evidence the defendant moved for a nonsuit and a dismissal of the plaintiff's complaint upon the ground that it appeared affirmatively that the plaintiff's injuries were received because of his own negligence and not because of any negligence on the part of the defendant; that the plaintiff was injured because of one of the risks incident to the plaintiff's employment and, therefore, assumed by him, and that the car which was left fouling track 6 was left there by the plaintiff himself; that he was in complete control of the yard and that it was his duty, as admitted by himself, to see that the cars on the one track did not foul the others.

Jarvis P. O'Brien for appellant.

Walter A. Fullerton and *James A. Leary* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
CARDOZO, McLAUGHLIN and CRANE, JJ.

**THE SPRING GARDEN INSURANCE COMPANY, Respondent,
v. MICHAEL DOLAN et al., Appellants.**

Spring Garden Ins. Co. v. Dolan, 166 App. Div. 236, affirmed.
(Argued October 23, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered February 3, 1915, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. The plaintiff is an insurance company, doing a general fire insurance business, and on or about November 2, 1905, appointed one Arthur J. Collier its agent in Coxsackie, N. Y. On the appointment of said agent he gave a bond in the penal sum of \$500 for the faithful performance of his duties as such agent with the above-named defendants as sureties. The principal of the bond, Arthur J. Collier, is not a party in this action, which is brought to recover an alleged balance due from said Collier, which as is alleged has not been paid and which the plaintiff seeks to recover from the defendants as sureties on the bond of said agent.

N. A. Calkins for appellants.

Jerome L. Cheney for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
CARDOZO, McLAUGHLIN and CRANE, JJ.

**IRENE PERCIPPE, Respondent, v. ELIAS S. MANEE et al.,
Appellants.**

Percippe v. Manee, 168 App. Div. 913, affirmed.

(Argued October 23, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 26, 1915, affirming a judgment in favor of plaintiff entered upon a verdict in an action brought to recover damages for personal injuries received by the plaintiff, a tenant of an apartment on the sixth floor of defendants' apartment house, caused by the alleged defective condition of the dumbwaiter used in common by the defendants' tenants. While plaintiff had her head and shoulders inside of the dumbwaiter taking some household supplies from the bottom shelf of the dumbwaiter, it was lowered and struck her. Plaintiff's evidence tended to show that owing to a defect in the construction of the dumbwaiter it could not be brought up so that the bottom was on a level with the sill and that the plaintiff could not take the things which were in the lower part of the dumbwaiter without lifting up the shelf and putting her head and part of her body in and bending down to reach them.

Edward P. Mowton for appellants.

Louis Lowenstein for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
CARDOZO and CRANE, JJ. Not sitting: McLAUGHLIN, J.

DANFORD J. PENFOLD et al., Respondents, v. HUBERT LARKIN, Individually and as Surviving Member of the Copartnership of LARKIN & SANGSTER, Appellant.

Penfold v. Larkin, 167 App. Div. 952, affirmed.

(Argued October 23, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 8, 1915, affirming a judgment in favor of plaintiff entered upon a verdict. The complaint alleged that the plaintiffs owned certain real and personal property in Lockport, N. Y., in the years 1910 and 1911, in close proximity to the Barge canal enlargement; that the defendants were contractors engaged in construction work on such enlargement under a contract with the state of New York and, among other work, were driving an underground hydraulic tunnel through the rock under a portion of the brick stores on the premises of the plaintiffs, the right to drive which tunnel had been duly appropriated by the state; that in driving such tunnel the defendants negligently and carelessly used unnecessarily excessive amounts of blasting explosives in removing the rock directly under and each side of the plaintiffs' buildings, and thereby injured the buildings and contents; that defendants' other construction work consisted of demolishing the old canal locks and constructing new ones, which work was above the surface, and that by their blasting operations in that work they threw rocks, stones, earth and debris on to plaintiffs' premises, breaking windows, puncturing roofs, injuring interior decorations, stock in trade, etc. The answer denied the negligent operations and the throwing of the rocks and the damages flowing therefrom.

David Tice and William H. Earl for appellant.

G. D. Judson for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
CARDOZO, McLAUGHLIN and CRANE, JJ.

RAYMOND CONCRETE PILE COMPANY, Appellant, v.
JOHN THATCHER & Son, Respondent.

Raymond Concrete Pile Co. v. Thatcher & Son, 166 App. Div. 522, affirmed.

(Argued October 24, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 18, 1915, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court for the amount of an offer of judgment made by the defendant. The suit was brought to recover the sum of \$1,703.62, with interest, which the plaintiff alleged became due to it from the defendant under the terms of a written contract whereby the plaintiff agreed to place certain piles for the defendant at the price fixed by the agreement. Plaintiff alleged that it placed the piles and became entitled to the money. The amount sued for is the balance of the contract price. The answer was a general denial of the material allegations of the complaint. At the trial the defendant insisted that the plaintiff was not entitled to be paid for twenty-three of the piles on the ground that as to them plaintiff did not comply with the provisions of the contract. The defendant's view of the contract was adopted by the trial justice, who after considerable argument with plaintiff's attorney at the end of the plaintiff's case decided that the twenty-three piles which the defendant refused to pay for were not placed in accordance with the provisions of the contract. As the defendant had made an offer of judgment for the number of the piles admitted to have been placed in accordance

with the contract, a verdict was thereupon directed by the court in favor of the plaintiff for the amount of the defendant's offer.

Martin Conboy for appellant.

Benjamin Reass, Hugo Hirsh and *Emanuel Newman* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDODOZO, McLAUGHLIN and CRANE, JJ.

FIORE AMANNA, Appellant, v. RICHARD CARVEL et al., Respondents, Impleaded with Others.

Amanna v. Carvel, 167 App. Div. 557, affirmed.

(Argued October 24, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 28, 1915, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien. Defendant Carvel, who had a contract with the city of New York for the construction of a school building in the borough of Brooklyn, entered into two sub-contracts with plaintiff by the terms of which the latter agreed to do all of the excavating work, rubble stone work and furnish all concrete footings required under the specifications. Thereafter plaintiff filed a lien under both contracts and this action was brought to foreclose the same. The defendant surety company executed a bond, upon which the lien was discharged. The Appellate Division modified the findings made by the trial court in three particulars: (1) By reversing the finding that the plaintiff was entitled to recover \$1.50 per cubic yard for earth which fell into

the pier holes and pipe tunnels; (2) by allowing the defendant Carvel credit for 1,600 barrels of cement at \$1.68 net per barrel, instead of at \$1.40 per barrel, and (3) by allowing Carvel \$521.43 for plastering 7,449 square feet of wall which the plaintiff, under his contract, was obliged to plaster but did not, making in all a total allowance to the defendant Carvel of \$2,453.43, with interest, amounting to \$222.05, being \$2,675.48 in all, by which sum the judgment herein was reduced.

J. Power Donellan for appellant.

Nathan F. Giffin and *James A. Delehanty* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: *Hiscock*, Ch. J., *CHASE*, *COLLIN*, *HOGAN*, *CARDOZO* and *CRANE*, JJ. Not sitting: *McLAUGHLIN*, J.

ORANGE T. FANNING et al., Appellants, v. BELLE TERRE, INCORPORATED, et al., Respondents, and CHARLES A. SQUIRES, as Trustee in Bankruptcy of FRED N. YARRINGTON, Appellant, Impleaded with Others.

Fanning v. Belle Terre, 168 App. Div. 929, affirmed.
(Argued October 24, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 24, 1915, affirming a judgment of Special Term in an action to foreclose a mechanic's lien. The judgment from which the appeal was taken affirmed a judgment which dismissed the plaintiffs' complaint, with costs, and determined that notices of lien, filed by the plaintiffs and by the defendant F. N. Yarrington were insufficient and void, and that the deed of the premises described in the complaint executed by defendant Belle Terre Development Company to defendant

Suburban Construction Company, and dated July 29, 1909, vested the title to said premises in said Suburban Construction Company, and that said deed had priority over the notices of lien filed by the plaintiffs and Yarrington.

Thomas J. Ritch, Jr., and L. H. Dickerson for appellants.

Willard N. Baylis, Frederick H. Sanborn and Hugh Satterlee for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDODOZ, McLAUGHLIN and CRANE, JJ.

HENRIETTA HESS, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.

Hess v. International Railway Co., 167 App. Div. 959, affirmed.

(Argued October 24, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 9, 1915, which affirmed a judgment in favor of plaintiff entered upon a verdict. The complaint alleged the operation by the defendant in the city of Buffalo, N. Y., of a street railway for the transportation of passengers; that on the 14th day of April, 1912, plaintiff became a passenger on one of its cars, the step of which was so old, worn, splintered, loose, cracked, unsafe and unfit for the use of passengers in boarding and alighting from said car and so carelessly, negligently and improperly furnished that in alighting therefrom the plaintiff stepped on one of said steps and through the negligence of the defendant in maintaining it, slipped and fell therefrom with great force and violence and thereby sustained serious injuries which are permanent and progressive and caused wholly through the negligence of the defendant and without contributory negli-

gence on the part of plaintiff. The answer was a denial of the allegations of defendant's negligence and of plaintiff's injuries.

Dana L. Spring for appellant.

W. W. Chamberlain and *Eugene M. Barlett* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

ORLANDO T. CARPENTER, as Administrator with the Will Annexed of CAROLINE L. CARPENTER, Deceased, Respondent, *v.* THE NEW YORK TRUST COMPANY et al., Defendants, and CHARLES RUSH et al., as Executors of REESE CARPENTER, Deceased, Appellants.

Carpenter v. New York Trust Co., 174 App. Div. 378, affirmed.
(Argued October 24, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 20, 1916, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The subject-matter of this litigation originally was the claims of the Kensico Cemetery against Caroline L. Carpenter and her husband, Reese Carpenter, and the claims of each and their estates against said cemetery. As two actions then pending between the parties were about to be tried, a compromise of all matters in dispute between Kensico Cemetery and both estates of Caroline L. Carpenter and Reese Carpenter was effected, whereby the Kensico Cemetery deposited to the credit of this action \$32,500, received releases from both estates and the actions were discontinued as to it and the New York Trust Company, and the stipulation of settlement pro-

vided that with respect to the ownership of said fund, the two estates litigate that question.

Michel Kirtland for appellants.

James Dunne for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and CRANE, JJ. Not sitting: McLAUGHLIN, J.

ROCK ISLAND BUTTER COMPANY, Respondent, v. JAMES ROWLAND, Appellant.

Rock Island Butter Co. v. Rowland, 168 App. Div. 913, affirmed.
(Submitted October 25, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 24, 1915, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover from defendant the sum of \$10,000, with interest, upon an alleged sealed instrument signed by defendant, wherein he promised to pay to one Frederick E. Rosebrock the sum of \$10,000 on August 1, 1896. Plaintiff brought the action as assignee of this obligation by various mesne assignments and introduced evidence tending to show that the instrument had been consumed in a fire which destroyed the building wherein it was deposited. The answer was a general denial. On the trial the principal point litigated was whether the instrument was sealed or unsealed and hence whether the six years' Statute of Limitations was applicable.

Delos McCurdy and *Henry W. Baird* for appellant.

Frederic C. Pitcher and *Walter H. Pollak* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and CRANE, JJ. Not sitting: McLAUGHLIN, J.

BURTON THOMPSON, Appellant, v. JACKSON-STEINWAY COMPANY et al., Respondents.

Thompson v. Jackson-Steinway Co., 167 App. Div. 898, affirmed.
(Argued October 25, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 5, 1915, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. In February, 1906, the defendant John M. Thompson and one George B. F. Randolph, now deceased, as brokers, negotiated a contract for the sale of a tract of property in Long Island City, containing 375 lots, for the sum of \$460,000. The vendor in this transaction was the Pennsylvania Terminal Real Estate Company, and the purchaser was William N. Heard, who acted as a dummy for the real principals. The defendant Jackson-Steinway Company was subsequently organized and took title to the property upon the closing. For their services in the transaction John M. Thompson and Randolph were entitled to a brokerage commission of \$11,500. This amount, together with an additional \$1,000 in cash contributed by Randolph was turned in by them to the defendant Jackson-Steinway Company, and on April 21, 1906, that company by a formal written contract dated on that day employed these brokers as its agents for the management and resale of the property in question. By the terms of this contract the company stipulates to pay the brokers for the services to be rendered by them twenty-five per cent of its profits on resales of the property, such profits to be ascertained and paid upon an audit of the company's books at the end of its fiscal year. By a series of mesne assignments from John M. Thompson the plaintiff became vested on November 30, 1906, with the right to forty per cent of the profits accruing to the former under the contract. For an accounting as to such share this

action was brought. The Special Term held that the books of the defendants did not show any profits; that the plaintiff had no right to an accounting in the then state of the enterprise and that the action had been prematurely brought.

Donald A. Millard for appellant.

Benjamin Scharps for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

H. G. VOGEL COMPANY, Appellant, v. GEORGE BACKER CONSTRUCTION COMPANY, Respondent.

Vogel Co. v. Backer Construction Co., 166 App. Div. 921, affirmed.
(Argued October 26, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 4, 1915, affirming a judgment in favor of plaintiff for but part of the relief demanded; entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien. The complaint set forth that a written agreement was entered into between plaintiff and defendant, whereby plaintiff agreed to and did install an automatic sprinkler system on behalf of defendant in its premises; that the defendant agreed to pay the sum of \$6,000 therefor, and that no part of said sum had been paid, except \$2,000, leaving a balance due and owing of \$4,000. The amended answer denied substantially all of the material allegations of the complaint, and interposed two counterclaims. The first counterclaim alleged that damage was done by plaintiff to the floors and ceilings of defendant's building; that plastering, painting and mason work were injured, and rubbish and dirt left behind by plaintiff;

that the sum of \$1,700 was expended by defendant for making repairs to the building and removing rubbish and dirt. The second counterclaim alleged that plaintiff did not commence work upon the installation of the sprinkler system in the building as soon as it was in shape to receive the same, but on the contrary delayed two months; that by reason of the delay of two months defendant was forced to expend the sum of \$1,320 as salary for a general superintendent, a superintendent and watchman. Judgment was given for plaintiff in the sum of \$3,000, without costs, the defendant's first counterclaim being upheld to the extent of the sum of \$800, and the secnd counterclaim to the extent of the sum of \$200.

David Bernstein and I. Maurice Wormser for appellant.

Samuel Levy and Reuben Rodecker for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and CRANE, JJ. Not sitting: McLAUGHLIN, J.

FRANK CANDEE, Respondent, v. PENNSYLVANIA RAIL-ROAD COMPANY, Appellant.

Candee v. Pennsylvania R. R. Co., 166 App. Div. 909, affirmed.
(Argued October 26, 1917; decided November 13, 1917.)

APPEAL from a judgment, entered December 14, 1914, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial and directed reinstatement of said verdict in an action to recover for personal injuries alleged to have been occasioned plaintiff through the negligence of defendant. Plaintiff, while walking along the landing platform at one of defendant's stations while waiting for a train

on which he intended to become a passenger, was struck from behind by an approaching engine and received the injuries complained of. The motion to set aside the verdict was granted upon the grounds that it appeared from the evidence that the plaintiff was guilty of contributory negligence which caused or contributed to the accident; that the verdict of the jury was contrary to the instructions of the court and was against the weight of evidence on the question of contributory negligence.

Allen J. Hastings for appellant.

Thomas H. Dowd for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, McLAUGHLIN and CRANE, JJ.

**MECCA REALTY COMPANY, Appellant, v. KELLOGG
TOasted CORN FLAKES COMPANY, Respondent.**

Mecca Realty Co. v. Kellogg Toasted Corn Flakes Co., 166 App. Div. 74, affirmed.

(Argued October 29, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 20, 1915, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court for an amount conceded by defendant to be due the plaintiff in an action for rent. The action involved the construction of the lease between the parties. This lease was dated September 18, 1911, wherein plaintiff let to defendant for three years, beginning November 1, 1911, at the monthly rental of \$1,250, the roof of the Mecca Building, bounded on the west by Broadway, on the east by Seventh avenue and on the south by Forty-eighth street, New York city, and provided: "Said entire roof and space above the cornice thereof to be used solely for the purpose of erecting and maintaining

thereon and above the cornice thereof a sign structure for advertising sign purposes either painted or electric, or both, for the displaying of advertisements of a lawful nature of the products of the tenant. If at any time during the term of this lease a building should be erected in the plot of ground to the south, located between Forty-seventh and Forty-eighth streets and Broadway and Seventh avenue, of such a height as to obstruct the view of the signs of the tenant as provided for herein, then the tenant may upon thirty days' notice to the landlords in writing of its intention so to do cancel this lease, said cancellation to take effect at the expiration of said thirty days' notice and at the end of a month, and this lease shall then be terminated." Defendant contended that a "sky sign" which was erected on the plot to the south, and which, in part, obstructed the view of defendant's sign, entitled defendant to cancel the lease, and that it did lawfully cancel the same.]

Jesse S. Epstein and John J. Quencer for appellant.

David Leventritt for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

MARY L. CAMPION, Appellant, *v.* THE ROMAN CATHOLIC ORPHAN ASYLUM IN THE CITY OF NEW YORK et al., Respondents.

SAME, Appellant, *v.* SAME, Respondents.

Campion v. Roman Catholic Orphan Asylum, N. Y. City, 168 App. Div. 910, affirmed.

Campion v. Roman Catholic Orphan Asylum, N. Y. City, 168 App. Div. 915, affirmed.

(Argued October 30, 1917; decided November 13, 1917.)

APPEAL, in each of the above-entitled actions, from a judgment of the Appellate Division of the Supreme

Court in the first judicial department, entered May 18, 1915, affirming a judgment in favor of defendants entered upon an order of the court at a Trial Term setting aside a verdict directed by the court and directing judgment in favor of defendants. These were actions of ejectment brought by the heir at law of John Laden, deceased, to recover possession of the real estate of which he died seized and which he had devised by will, creating a trust of the whole residuary for the benefit of the plaintiff, his only child, for life, and vesting the remainder upon her death, one-half in her issue and one-half in the late Archbishop Corrigan. The plaintiff sought to recover on the ground that the trust of the residuary estate in the will is void, because it unlawfully suspended the power of alienation.

Emanuel J. Myers and *Gordon S. P. Kleeberg* for appellant.

Edward H. Daly and *Morgan J. O'Brien* for Roman Catholic Orphan Asylum, respondent.

Addison S. Pratt for Marion G. Campion, respondent.

Judgments affirmed, with costs; no opinion.

Concur: *Hiscock*, Ch. J., *COLLIN*, *CUDDEBACK*, *HOGAN*, *POUND* and *ANDREWS*, JJ. Not sitting: *McLAUGHLIN*, J.

MAX S. GRIFENHAGEN, as Sheriff of the County of New York, et al., Respondents, v. WHILDEN & HANCOCK, NEW YORK, Appellant.

Grifenhagen v. Whilden & Hancock, 168 App. Div. 912, affirmed.
(Argued October 30, 1917; decided November 13, 1917.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 26, 1915, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

On January 27, 1913, Frank L. Randall commenced an action against the Italiana Insurance Company upon two policies of fire insurance; a warrant of attachment was issued and on January 28, 1913, the sheriff of New York county levied upon \$2,000, in the possession of Whilden & Hancock, New York, the defendants in this action. The sheriff left this property in the possession of the defendants, and took a receipt therefor. The action against the Italiana Insurance Company, the attachment debtor, proceeded to judgment, and on April 15, 1913, an execution was issued to the sheriff of New York county against the property levied upon by virtue of said attachment. Following a demand and refusal, Julius Harburger, as sheriff of New York county, commenced this action under section 655 of the Code of Civil Procedure. Before the same came on for trial, his term of office as sheriff expired, and he died. Upon the express consent of the defendants, an order was entered, substituting Max S. Grifenhagen, as sheriff of the county of New York, as plaintiff. Thereafter, upon motion, Frank L. Randall, the plaintiff in the attachment action, was added as a co-plaintiff in this action. Upon the trial the defendant offered testimony to show that the property levied upon did not belong to the attachment debtor, and the exclusion of this evidence presented the sole point upon the appeal from the judgment herein.

Albert Massey for appellant.

Louis J. Wolff and *William Otis Badger, Jr.*, for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

**THOMAS D. RAMBAUT, Appellant, v. WILLIAM S. TEVIS,
Respondent.**

Rambaut v. Tevis, 164 App. Div. 324, affirmed.

(Argued October 30, 1917; decided November 13, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 20, 1914, reversing a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury and granting a new trial in an action upon a promissory note made by the defendant to his own order. The trial court found that on or about the 15th day of February, 1909, Tevis delivered the note to Charles W. French; that thereafter, on or about the 5th day of May, 1909, French delivered said note to the plaintiff in payment of services theretofore and thereafter rendered by plaintiff, at the request of said French, in furtherance of certain enterprises in which said French and the defendant were interested, said services being professional services as an attorney and counselor at law, with respect to the organization and legal inception of the various enterprises involved, being reasonably worth the amount of the said note. The trial court further found that the plaintiff took the note in due course, in good faith, for value, and without notice of any infirmity in the instrument or defect in the title of any person with respect thereto. The Appellate Division held, as matter of law, that the plaintiff did not take the note in due course, holding that French was an agent of Tevis, that he used the note to pay his own debt to the plaintiff, and that where an agent or other fiduciary uses the property or funds of his beneficiary to pay his own debt the person taking the same, with notice of the agent's interest, acts at his peril.

Edward H. Wilson for appellant.

Allan R. Campbell and *Ellwood M. Rabenold* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation; with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Application for the Probate of the Will of ELIZABETH CONNELL, Deceased.

ELIZABETH CRAIG, Appellant.

In the Matter of the Application to Set Aside a Decree Granting Ancillary Letters of Administration on the Will of ELIZABETH CONNELL, Deceased.

SADIE R. BARROWS, Appellant; FARMERS' LOAN AND TRUST COMPANY, as Ancillary Executor of ELIZABETH CONNELL, Deceased, Respondent.

(Submitted November 12, 1917; decided November 13, 1917.)

Motion to amend remittitur granted and remittitur amended so that instead of reading and providing "with one bill of costs to the appellants payable out of the estate," it shall read and provide "with one bill of costs to the appellants in this court and in the Appellate Division payable out of the estate." (See 221 N. Y. 190.)

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ABDUCTION.

See People v. Pecoraro (Mem.), 662.

ACCEPTANCE.

What constitutes a purchaser's acceptance of goods shipped to him in pursuance of a contract of sale — what purchaser must do to reject goods if they do not conform to the contract — when question of acceptance by purchaser one of fact to be determined by a jury.

See SALE, 2.

ACCOUNTING.

See Matter of Hallock (Mem.), 486; *Matter of Lockwood* (Mem.), 489; *Matter of Spaulding* (Mem.), 619; *Matter of Elliott* (Mem.), 638; *Matter of Greifenstein* (Mem.), 642; *Matter of Harden* (Mem.), 643; *Matter of Mead* (Mem.), 645; *Thompson v. Jackson-Steinway Co.* (Mem.), 721.

ADOPTION.

See Matter of McDevitt (Mem.), 598.

APPEAL.

1. *Judgment or order on appeal to Appellate Division — Power of Appellate Division to review the facts and render a new final judgment in cases of contract and in tort cases — When Appellate Division has the power to reduce the verdict and grant judgment for a smaller amount.* In an action to recover on contract, the jury rendered a verdict in favor of the plaintiff, which the judge presiding set aside as excessive, and granted a new trial. The Appellate Division reversed the order of the trial judge and reinstated the verdict, but with the consent of the plaintiff reduced the same and ordered judgment for that amount in favor of the plaintiff. Judgment was entered accordingly, from which the defendants now appeal. *Held*, that there is now no distinction between the power of the Appellate Division in contract cases and tort cases to render final judgment such as the trial court should have given. That court now has the power, with the consent of the party in whose favor the verdict was rendered, to reduce a verdict and grant judgment for a smaller amount. *Herrman v. U. S. Trust Co.* 143

2. *When Appellate Division reverses or modifies judgment of Trial Term on the facts, it must make findings necessary to support the judgment it orders — Court of Appeals may review without exceptions.* Where the Appellate Division reverses or modifies a judgment of the Trial Term and orders a judgment proceeding on a different theory of the facts, it must make such additional findings as are necessary to support the judgment which it has ordered. No exception need be taken to these findings to entitle them to be reviewed in the Court of Appeals. If there is evidence to sustain them this court cannot interfere provided they justify the judgment which the Appellate Division directs. *Andrews v. Cohen.* 148

3. *Erroneous appeal to Appellate Division from a judgment entered on its own order.* An appeal does not lie to the Appellate Division from a judgment entered upon its own order dismissing a complaint. The judgment entered thereon in the county clerk's office is the final judgment of that court and an appeal lies therefrom to the Court of Appeals. *Silverstein v. Standard Acc. Ins. Co.* 332

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4. *Construction of statement in order of the Appellate Division that "the facts have been examined."* The statement in an order of the Appellate Division that the facts have been examined does not import either the approval or disapproval of them as found by the jury. *Ochs v. Woods.* 335

5. *Conflict of statements in direct examination and cross-examination for the jury to determine.* Where a witness makes one statement in the course of the direct examination and a contradictory statement on the cross-examination, there is a conflict in the evidence to be disposed of by the jury. *Id.*

6. *Facts examined in action for deceit and held error to reverse judgment entered upon verdict.* This action is to recover the damages sustained by the plaintiff through the alleged deceit of the defendant in inducing the plaintiff to accept another, in the place of the defendant, as owing him commissions for his services in securing a tenant of real estate. The trial resulted in a verdict in favor of the plaintiff. The Appellate Division reversed the consequent judgment and the order denying defendant's motion for a new trial, and dismissed the complaint. *Held*, that the evidence warranted its submission to the jury and that the Appellate Division erred in dismissing the complaint. *Id.*

7. *Provision of statute (Code Civ. Pro. § 190, amd. L. 1917, ch. 290) authorizing appeal to Court of Appeals when constitutional question is involved.* Under the clause of section 190 of the Code of Civil Procedure (as amended by chapter 290 of Laws of 1917) which authorizes an appeal to the Court of Appeals where there is directly involved a constitutional question, there must be presented directly and primarily an issue determinable only by the construction by this court of the Constitution of the state or of the United States. *People ex rel. Moss v. Suprs.* 367

8. *Appeal will not lie where construction of statute only is involved.* An appeal will not lie where the primary and direct question presented and decided by the Appellate Division, was "Whether the statute under consideration (County Law [Cons. Laws, chap. 11], § 240, subds. 16, 18) meant or intended that the costs and expenses of a county officer who was removed by the governor on charges should be a county charge." *Id.*

9. *Appellate Division may not base a finding upon the conclusion that if proper evidence had been received it would have been incredible.* The Appellate Division cannot base a finding upon no evidence, but upon its conclusion that if proper evidence on a plain question of fact had been received it would have been incredible. It is reversible error for that court in order to cure an error and sustain a decree of a surrogate, to find that if competent evidence offered by appellant had been received the witnesses were discredited by the history of the case and their conduct in it, and the evidence offered could not have changed the result. *Matter of Reed.* 585

See People v. Stark (Mem.), 514; *Matter of Sanborn* (Mem.), 530; *Coffey v. Coffey* (Mem.), 530; *Quinn v. Thatcher & Son* (Mem.), 543; *Neustadt v. Jamaica Estates* (Mem.), 571; *Fleischer v. Fleischer* (Mem.), 572; *Epps v. Price* (Mem.), 573; *Matter of Cobb* (Mem.), 574; *Matter of Landes* (Mem.), 574; *Benoliel v. Benoliel* (Mem.), 575; *Baucus v. Weatherall* (Mem.), 575; *Dalton v. Parker* (Mem.), 576; *Bement v. A. L. Ins. Co.* (Mem.), 577; *Haas Tobacco Co. v. Am. Fidelity Co.* (Mem.), 577; *Crozier v. Richardson* (Mem.), 578; *McDonald v. State* (Mem.), 630; *Veccini v. Wuppermann*

APPEAL — *Continued.*

(Mem.), 632; *Smith v. Smith* (Mem.), 633; *Coursey v. Coursey* (Mem.), 634; *Robinson Amusement Co. v. B. B. Casino* (Mem.), 634; *Matter of Lansing Liquidation Corporation* (Mem.), 635; *Hertz v. Wheelock* (Mem.), 636; *Chapman v. Waterman Co.* (Mem.), 637; *McIntosh v. Wolfe* (Mem.), 637; *Matter of Northern Bank* (Mem.), 667; *Matter of Edelsten* (Mem.), 668.

Proceeding to reinstate civil service employee in position from which he had been removed without an opportunity of making an explanation — when decision therein resents only question of law and is appealable to this court.

See CIVIL SERVICE, 1.

Court of Appeals has no power to extend meaning of Constitution.

See CONSTITUTIONAL LAW, 9.

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APPELLATE DIVISION.

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See APPEAL, 4-6.

May not base a finding upon the conclusion that if proper evidence had been received it would have been incredible.

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Erroneous dismissal of complaint by Appellate Division — credibility of witnesses question for jury.

See EVIDENCE, 1.

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ASSESSMENT.

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ASSESSMENT — *Continued.*

expense of opening the street except their proportion of damages for buildings taken or injured by the changes made in opening the street.

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ATTORNEY AND CLIENT.

Action to recover from husband value of services of attorney for wife in actions for divorce and separation in excess of costs allowed and for moneys advanced by attorney for support of wife while alimony was unpaid — attorney not entitled to lien for services, but has a lien for money loaned to the wife upon the unpaid alimony and fine in contempt proceedings.

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ATTORNEYS.

Proceedings for disbarment of an attorney — Such proceeding not a criminal prosecution for the imposition of a penalty or forfeiture — Attorney not immune from disbarment because proceeding therefor is based upon testimony on a trial in substance confessing the acts for which he is liable to disbarment — Constitutional provision that no person shall be compelled to testify against himself not applicable in such proceeding. Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards, and whenever the condition is broken the privilege is lost. The State Constitution (Art. 1, § 6) says that no person shall "be compelled in any criminal case to be a witness against himself." But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime. A proceeding looking to disbarment is not a criminal case. Disbarment is not a penalty or forfeiture within the meaning of the statute (Penal Law, § 584) providing that no person shall be excused from testifying on any trial for a violation of article 54 of that law (which defines and punishes conspiracy), upon the ground that the testimony required of him may tend to subject him to a penalty or forfeiture, and providing further that no person shall be subjected to any penalty or forfeiture on account of anything concerning which he may so testify, and that no testimony so given shall be received against him upon any criminal investigation, proceeding or trial. Hence, an attorney is not immune from discipline by reason of having given testimony on a trial, which was in substance a confession of the acts for which he is liable to disbarment. *Matter of Rous.*

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See Matter of Michaelson (Mem.), 497; Matter of Palmieri (Mem.), 611.

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When agreement by owners to accept repairs to automobile injured by fire a bar to an action on insurance policy for total loss of car.

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Right of carpenters' brotherhood or union to refuse to use wood-work made by non-union manufacturers — when the sending by representatives of such union of notices to members of the union and to building contractors not to use such woodwork is not illegal — injunctions will not be granted to restrain such acts where there are no findings of malice or intent to injure the good will or business of the plaintiffs or non-union manufacturers.

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When notice of cancellation of fire insurance policy given by insured and received by insurer effective, although insurer took no action with reference thereto until after loss by fire — construction and application of section 122 of Insurance Law relating to cancellation of policies of fire insurance.

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When certiorari to review assessment obtained for taxpayer by a corporation should not be dismissed on ground that corporation was prohibited from practicing law.

See TAX, 2.

CHARGE.

Erroneous charge that motive should not be considered by jury.

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CIVIL SERVICE.

1. *Proceeding to reinstate civil service employee in position from which he had been removed without an opportunity of making an explanation — When decision therein presents only question of law and is appealable to this court.* In a proceeding to reinstate a civil service employee in a position from which he had been removed without an opportunity of making an explanation where the material allegations of a petition for a writ are admitted, or not denied, and different inferences cannot be drawn therefrom, only a question of law is presented and the decision is upon the merits and appealable to this court. *People ex rel. Van Tine v. Purdy.* 396

2. *Summary dismissal of deputy tax commissioner of New York city violation of city charter.* The removal of one from the position (Civil Service Law, § 22) of deputy tax commissioner of the city of New York, to which position he had been regularly appointed from the competitive civil service list, without giving him an opportunity of making an explanation, or entering the grounds of his removal upon the records of the department, is a violation of the city charter (L. 1901, ch. 466, § 1543.) *Id.*

See People ex rel. Osterhout v. Williams (Mem.), 580; People ex rel. Phillips v. Morgan (Mem.), 608; People ex rel. Riordan v. Feldman (Mem.), 655; People ex rel. Tyng v. Prendergast (Mem.), 659.

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Marriage settlements — agreement between father and prospective husband of his daughter to pay daughter certain sum annually — when daughter, although not a party to the contract, may enforce contract and recover unpaid installment.

See CONTRACT, 3.

CONSOLIDATED LAWS.

Ch. 4 — Business Corporations Law — corporations prohibited from practicing law.

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CONSOLIDATED LAWS — *Continued.*

Ch. 7 — Civil Service Law — summary dismissal of deputy tax commissioner of New York city improper.

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Ch. 11 — County Law — costs and expenses of proceedings for removal of county officer.

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See WILL, 1.

Ch. 17 — Election Law — section 122 constitutional.

See CONSTITUTIONAL LAW, 10.

Ch. 20 — Agreement by corporation to pay interest in excess of legal rate is not usurious.

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Ch. 41 — Personal Property Law — loss of goods shipped by express — failure of vendor to state value of goods — when vendor cannot compel buyer to pay for goods shipped to take place of goods lost.

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Idem — Workmen's Compensation Law — president and principal executive officer of corporation not entitled to compensation for injury.

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Idem — Workmen's Compensation Law — when superintendent of apartment house not entitled to compensation for injuries caused by fall of a radiator which he was moving.

See WORKMEN'S COMPENSATION, 7.

Idem — Meaning and application of term "employee" in section 3 of law as amended.

See WORKMEN'S COMPENSATION, 8.

CONSTITUTIONAL LAW.

1. *Legislative grant to fill in and erect docks on lands under water conveys a vested inchoate right in the nature of a franchise.* A legislative grant without a valuable consideration to an upland owner bordering on public tidewater to fill in and erect docks on lands lying under water in front of him does not convey title in fee to said latter lands. It does, however, give more than a mere license revocable at will. It conveys a vested, inchoate right in the lands to be filled in, which is in the nature of a franchise. If the upland owner exercises

CONSTITUTIONAL LAW — *Continued.*

his right and fills in the land in question he thereby acquires title to the same as a necessary incident to the enjoyment of the grant. On the other hand, if he fails within a reasonable time or within the time specified to exercise his right the same may be forfeited for non-user.
First Construction Co. v. State of New York. 295

2. *Act granting such right requires a two-thirds vote.* An act attempting to grant such a right or franchise comes within the provision of the Constitution requiring a two-thirds vote. *Id.*

3. *When provisions of act confirming grant valid though act unconstitutional in other respects.* Where prior to 1884 acts had been passed by less than a two-thirds vote granting to an upland owner, without valuable consideration, the right to fill in and erect docks on lands in front of his premises, and in the latter year an act was passed by the necessary two-thirds vote which by its title indicated a purpose to confirm the grants attempted to be made by the prior acts, but which in its body not only attempted to confirm the right or franchise granted by said prior acts to fill in and thereby acquire title, but also attempted to convey title in fee to a large portion of the lands in question which had never been filled in, such act violated the provision of the Constitution, which says: "No private or local bill which may be passed by the legislature shall embrace more than one subject and that shall be expressed in the title." The purposes attempted by said latter act, however, are so distinct and separable that the act may be upheld in respect of the provisions indicated by the title confirming the grant of the franchise made by prior acts and thereby eliminating the defect arising from the lack of a two-thirds vote, although it be deemed and held unconstitutional so far as concerns the other purpose to convey the title in fee to lands in respect of which the franchise had not been exercised. *Id.*

4. *Measure of value of franchise to fill in lands appropriated by state for canal purposes.* In proceedings to acquire compensation for lands appropriated by the state for barge canal purposes, a certain sum per square foot for land lying under water based upon the theory that the claimant is the owner in fee of the premises in question is not the proper measure of the value of a franchise to fill in said lands and thereby acquire title in fee. The value of the land before filling would not necessarily be the same as the value of the land after it had been filled in less the cost of such filling; the cost of the latter might be more or less than the increase in value of the land by reason of such filling in. Moreover, various considerations might be taken into account in fixing the value of a franchise which might not find any place in an estimate of the value of land whereof the claimant held the title in fee. *Id.*

5. *State may interpose defense that acts granting rights are unconstitutional.* In such proceedings as above, the state may offer as a defense to a demand for damages because of the appropriation by it of land, the claim that the acts under which the claimant asserts its rights are unconstitutional and invalid. *Id.*

6. *When act granting franchise to fill in land under water invalid because lacking a two-thirds vote — When act ratifying and confirming such franchise valid though violative of Constitution in other respects — Measure of value of franchise.* By various acts prior to 1884, which lacked the necessary two-thirds votes, the right was in terms granted to plaintiff's predecessor and assignor, who was an upland owner bordering on Gowanus bay, Long Island, to fill in and erect docks upon land under water lying in front of his premises.

CONSTITUTIONAL LAW — *Continued.*

Only a small portion of the land described was ever filled in. In 1884 an act was passed by the necessary two-thirds vote, which in substance was entitled one to confirm said prior grants. In its body it attempted not only to confirm said prior acts and eliminate the defect arising from lack of necessary votes but also to give title in fee to a large portion of the lands in question which had never been filled in and to which, therefore, claimant's predecessor had never acquired any title independent of the lack of necessary votes. Subsequently these lands were appropriated by the state for Barge canal purposes, and a claim was filed by claimant for damages on account of such appropriation amounting to upwards of three millions of dollars. It was held that a grantee acquired title to lands which were filled in under such grants as were made to claimant's predecessor, and also that the act of 1884 cured the defect arising from lack of a two-thirds vote on the passage of the prior acts, and conveyed title to all of the lands in question whether filled in or not, and an award was made at a certain price per square foot on the theory that the claimant by virtue of the confirmatory act of 1884 had become the owner in fee of all the lands described in the original grants, whether filled in or not. *Held*, error; that the prior acts were defective because not passed by a two-thirds vote, and the confirmatory act of 1884 was unconstitutional and ineffective to grant title to lands which had not been filled in, because such purpose was not disclosed in the title of the act, although said act might be held valid and constitutional so far as it confirmed the grant under the earlier acts of a right to fill in and thereby acquire title, and which purpose was disclosed in the title; that this right was a mere franchise and its value was not properly fixed by an award which gave to the claimant damages at so much per square foot on the theory that it was the owner in fee of the lands, instead of the owner of a franchise to fill in said lands and thereby acquire title; that the test of a price per square foot on the theory of ownership in fee was not the proper one by which to measure the value of claimant's franchise, as different considerations might govern in the latter case than in the former one. *Id.*

7. *Not intent of legislature to extend right to fill in lands over space included within lines of streets.* Various acts of the legislature, including the one of 1884 above referred to, considered and *held*, that it was not the intent of the legislature by the acts granting to claimant's predecessor and assignor the right to fill in the lands in question, to extend said right over the space included within the lines of certain streets opened and established by legislative acts through the area in question, although said streets had never been physically opened or used at the time the act of 1884 was passed. *Id.*

8. *Coroner — New York (city of) — Statute abolishing office of coroner not in conflict with State Constitution.* The statute (L. 1915, ch. 284) abolishing the office of coroner in Greater New York, and establishing therein the office of chief medical examiner to be appointed by the mayor, is not in conflict with the home rule provision of the State Constitution (Art. 10, § 2). *Matter of Senior v. Boyle.* 414

9. *Court of Appeals has no power to extend meaning of Constitution — Queens county — Office of county clerk not required by Constitution to be filled at election in year 1917.* The Court of Appeals has no power to extend by a process of construction the plain meaning of the provisions of the State Constitution. Section 1 of article 10 and section 3 of article 12 of the State Constitution, by their express terms, are not applicable to the county of Queens and do not require that the office of county clerk therein should be filled at the election in the year 1917. *Matter of Becker v. Boyle.* 681

CONSTITUTIONAL LAW — *Continued.*

10. *Election Law — Section 122 constitutional — Municipal Court district in borough of Brooklyn a political subdivision.* For the purposes of section 122 of the Election Law a Municipal Court district in the borough of Brooklyn is a political subdivision. Section 122 of the Election Law, considered in its general application to the state, is not so unfair and unreasonable as to be unconstitutional. *Matter of Richards v. Boyle.* 684

Proceedings for disbarment of an attorney — such proceeding not a criminal prosecution for the imposition of a penalty or forfeiture — attorney not immune from disbarment because proceeding therefor is based upon testimony on a trial in substance confessing the acts for which he is liable to disbarment — constitutional provision that no person shall be compelled to testify against himself not applicable in such proceeding.

See ATTORNEYS.

Public officers — repayment of costs and expenses incurred by public officer in successfully defending himself against charges of misconduct — constitutionality of the statute (County Law, § 240, subd. 16) providing therefor.

See COUNTIES, 1.

CONTRACT.

1. *Sale — Delivery of goods — Refusal of purchaser to accept goods until delivered at factory of purchaser and inspection thereat — Vendor cannot maintain action for purchaser's breach of contract of sale when tender is accompanied by a condition.* Defendant having agreed to buy from plaintiff, an importer, a quantity of rubber, was notified of the arrival of shipments and asked to inspect the rubber at the warehouse or on the dock, which defendant refused to do and stated that there would be no acceptance until the rubber reached its factory. Plaintiff insisted on its inspection at the storehouse and that the rubber leaving the storehouse would be an acknowledgment of its acceptance. Defendant insisted that withdrawal of the goods from the warehouse must be without prejudice to their rejection afterwards. Neither side would yield. The plaintiff sold part of the rubber at a reduced price; the rest it retained and brought this action to recover the profit which was lost. Plaintiff's complaint, as amended on the trial, alleges that the defendant "wrongfully repudiated the said contract, and definitely notified the plaintiff that it would not thereafter perform the same." Held, that a tender, burdened with the condition, as this tender was, that inspection must first be made, and satisfaction stated, was not a tender which answered the requirements of the contract; that the plaintiff failed to establish that it rescinded the contract on the ground of defendant's anticipatory breach; that plaintiff having failed to give notice of an election to treat it as abandoned, the contract survived (Personal Property Law, § 146; L. 1911, ch. 571; Cons. Laws, ch. 41), and the award of damages in its favor cannot be sustained. *Rubber Trading Co. v. Manh. Manfg. Co.* 120

2. *Real property — Action to set aside deed of farm from plaintiff to his nephew, made in consideration of the latter's promise to support and care for plaintiff during life — Partial breach of such contract by nephew — Duties and obligations of grantee — Grantor entitled to lien upon premises.* This action was brought to set aside a deed of conveyance of a farm from the plaintiff to his nephew, the consideration of which was the latter's agreement, among other things, to properly support and care for the plaintiff during life, furnish him with spending money not to exceed one hundred and fifty dollars in any one year,

CONTRACT — *Continued.*

and upon his death to pay his funeral expenses. The performance of these conditions was made a lien upon the premises. *Held*, that the grantee in such a conveyance is bound to furnish the support in accordance with the agreement, without any demand therefor, but where the grantee has made substantial provision for support, which has been accepted by the grantor, the absence of any complaint or demand may be considered in determining whether the grantee has substantially performed his obligation. *Held, further*, that upon the facts found, the nephew was in default as to a part of his agreement and the plaintiff, by reason thereof, is entitled to some relief, and that under its terms he is entitled to a lien upon the premises for a reasonable amount of clothing and spending money not exceeding that mentioned in the agreement, which the nephew has failed to furnish, and in addition thereto is entitled, in the exercise of the court's discretion, to have a proper amount fixed and determined for his board and lodging, clothing and spending money, based upon his expectancy of life, which sums shall also be a lien upon the premises. *Kinney v. Kinney.*

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3. Marriage settlements — Consideration — Agreement between father and prospective husband of his daughter to pay daughter certain sum annually — When daughter, although not a party to the contract, may enforce contract and recover unpaid installment. Articles of agreement were entered into by defendant and his wife with a person who was affianced to and was to be married to their daughter. In consideration of that fact, the father promised the husband to pay a certain sum annually to the daughter. This action is brought by the assignee of the daughter and the husband to recover an unpaid installment. *Held*, that there was a sufficient consideration for the promise; that although the promise was to the husband it was intended for the benefit of the daughter, and when it came to her knowledge she had a right to adopt and enforce it, and in doing so she made herself a party to the contract. *De Cicco v. Schweizer.*

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See *Metropolitan Opera Co. v. Hammerstein* (Mem.), 507; *Beltling & Machinery Co. v. City of Corning* (Mem.), 522; *Nelson Co. v. Poppenberg* (Mem.), 535; *Lynch v. Murphy* (Mem.), 559; *Knudsen v. Remmel* (Mem.), 562; *Poppenberg v. Owen & Co.* (Mem.), 569; *Benz Auto Import Co. v. Froehlich* (Mem.), 570; *Spiritusfabrick v. Sugar Products Co.* (Mem.), 581; *Bradley v. Village of Union* (Mem.), 591; *Howard v. Breitung* (Mem.), 603; *Kobre Assets Corp. v. Baker* (Mem.), 616; *General Dehydrator Co. v. Bussing Co.* (Mem.), 625; *Adler v. Furst* (Mem.), 628; *Lord v. City of New York* (Mem.), 663; *Strobel v. Pierce* (Mem.), 669; *Alsens A. P. C. Works v. New Jersey D. & B. B. Co.* (Mem.), 674; *Bowes v. Small & Co.* (Mem.), 674; *Shaffer v. M. V. Brewing Co.* (Mem.), 697; *B. B. P. Fraternity v. B. A. L. B. B. Club* (Mem.), 704; *King v. Chapin* (Mem.), 710; *Raymond C. P. Co. v. Thatcher & Son* (Mem.), 715.

When agreement by owners to accept repairs to automobile injured by fire a bar to an action on insurance policy for total loss of car.

See INSURANCE, 1.

When notice of cancellation of fire insurance policy given by insured and received by insurer effective, although insurer took no action with reference thereto until after loss by fire — construction and application of section 122 of Insurance Law relating to cancellation of policies of fire insurance.

See INSURANCE, 2.

CONTRACT — *Continued.*

In absence of an interdicting statute parties may agree that a rate of interest, exceeding the legal rate, shall be paid — agreement to pay interest at a certain rate before a loan is due and a greater rate thereafter is an agreement to pay interest not a penalty — agreement by a corporation to pay interest in excess of the legal rate is not usurious, and the guarantor of such contract is liable thereon.

See INTEREST.

Services — action for wrongful discharge.

See MASTER AND SERVANT.

Corporation — when pledge of rental of apartment house, owned by corporation, as security for loan, the proceeds of which were used for the benefit of the corporation, valid.

See PLEDGE.

Change in law cannot impair the obligation of a contract.

See SALE.

What constitutes a purchaser's acceptance of goods shipped to him in pursuance of a contract of sale — what purchaser must do to reject goods if they do not conform to the contract — when question of acceptance by purchaser one of fact to be determined by a jury.

See SALE, 2.

When inequitable to decree specific performance of contract for purchase of real property.

See VENDOR AND PURCHASER.

CONVERSION.

See U. S. Asphalt Refining Co. v. Comptoir National D'Escompte (Mem.), 540; Rycroft v. Post (Mem.), 578; Shipley C. & S. Co. v. Mager (Mem.), 679.

Sale of stocks carried on margin — when sold without reasonable notice to customer, such sale constitutes a conversion — action by stockbrokers to recover sum claimed to be due from customer — when customer may interpose claim for value of his stocks purchased on margins and sold by parties to whom plaintiff had hypothecated them as collateral.

See STOCKBROKERS.

CORONER.

Statute abolishing office of coroner not in conflict with State Constitution.

See CONSTITUTIONAL LAW, 8.

CORPORATIONS.

Agreement by corporation to pay interest in excess of legal rate is not usurious.

See INTEREST.

When pledge of rental of apartment house, owned by corporation, as security for loan, the proceeds of which were used for the benefit of the corporation, valid.

See PLEDGE.

Prohibited from practicing law.

See TAX, 2.

COSTS.

Condemnation of land for a public highway — damages for loss of water from well caused by construction of highway — right to grant costs in such proceeding to non-resident owner of land is not taken away by section 154 of Highway Law as amended by chapter 497 of Laws of 1915, but an extra allowance may not be granted.

See EMINENT DOMAIN, 1, 2.

COUNTERCLAIM.

When surety cannot interpose cause of action, existing in favor of his principal, as a defense or counterclaim. A party when sued upon his obligation as surety cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff as a defense or counterclaim. The defense that the principal was induced to enter into a contract by fraud is only available to a surety when the principal repudiates the contract. *Ettlinger v. National Surety Co.* 467

COUNTIES.

1. *Repayment of costs and expenses incurred by public officer in successfully defending himself against charges of misconduct — Constitutionality of the statute (County Law, § 240, subd. 16) providing therefore.* Subdivision 16 of section 240 of the County Law (Cons. Laws, chap. 11), which provides that "The reasonable costs and expenses in proceedings before the governor for the removal of any county officer upon charges preferred against him, including the taking and printing of the testimony therein," are proper charges against a county, does not offend against the Constitution. There is no greater objection to the payment of the costs and expenses incurred by a public officer in defending himself against charges of misconduct than there is to the payment of the costs and expenses incurred in the prosecution of such charges. Hence, where a sheriff defended himself against charges of official misconduct presented to the governor, which charges were dismissed, the board of supervisors of his county properly allowed the expenses incurred by him in such defense. *Gavin v. Bd. of Suprs.* 222

2. *County clerks — Fees — Clerk of Erie county whose salary, fixed by statute, constitutes the whole compensation to be paid to him is not entitled to any part of fees payable to county clerks under Federal statutes for services in naturalization proceedings.* This action is to recover, by virtue of a statutory provision, one-half of the fees collected and delivered to the defendants by the plaintiff, while clerk of the county of Erie, for services performed by him in naturalization proceedings. The fees in question were received by virtue of the provisions of an act of Congress (34 Stat. at Large, ch. 3592, p. 596), which authorized the clerk to retain one-half of the fees thereby required to be paid to him in such proceedings. Our statute (L. 1885, ch. 502; L. 1891, ch. 149) provided that the clerk of the county of Erie should receive as compensation for his services, an annual fixed salary which "shall constitute the whole compensation which shall be allowed or paid to or received by said clerk for all official services performed by him for the state, for the county and for individuals, or which he shall be required or authorized by law to perform by virtue of his office as such clerk. It shall be the duty of said clerk to perform all services which he is or shall be required or authorized by law to perform by virtue of or by reason of his holding such office, including his duties as clerk of every court of which he is or shall be clerk, and no compensation, payment or allowance shall be made to him for his own use for any of such services except the salary aforesaid." Held, that the Federal statute did not control the ownership of the fees, and that the language

COUNTIES — *Continued.*

of the state statute restricted the compensation for all the official services of the plaintiff as clerk of the county of Erie to the stated salary and required him to pay all fees and emoluments, including those under consideration, to the treasurer of the county. *Price v. County of Erie* 260

Office of county clerk of Queens county not required to be filled at election in year 1917.

See CONSTITUTIONAL LAW, 9.

COUNTY LAW.

Costs and expenses of proceeding for removal of county officer.

See APPEAL, 8.

Repayment of costs and expenses incurred by public officer in successfully defending himself against charges of misconduct — constitutionality of the statute providing therefor.

See COUNTIES, 1.

COURT OF APPEALS.

May review without exceptions new findings by Appellate Division.

See APPEAL, 2.

Authority to appeal where constitutional question is involved — not applicable where construction of statute only is involved.

See APPEAL, 7, 8.

Proceeding to reinstate civil service employee in position from which he had been removed without an opportunity of making an explanation — when decision therein presents only question of law and is appealable to this court.

See CIVIL SERVICE, 1.

Has no power to extend meaning of Constitution.

See CONSTITUTIONAL LAW, 9.

COURT OF CLAIMS.

Notice of intention to file claim must be given pursuant to statute.

See STATE, 1.

Filing of claim not equivalent to filing of notice of intention to file claim.

See STATE, 2.

COURTS.

See Matter of People ex rel. Rea v. Prendergast (Mem.), 582.

COVENANTS.

Covenant for quiet enjoyment will be read into lease — inference not permissible that ouster by city was by implication excepted from covenant for quiet enjoyment.

See LANDLORD AND TENANT, 1, 3.

CRIMES.

1. *Murder — Evidence of identification of defendant as person who committed the crime.* Where a witness positively identifies a defendant as the man who committed a crime, the weight of the evidence of identification is for the jury unless it is incredible as a matter of law. But opinions expressed of the identity of a defendant particularly when

CRIMES — *Continued.*

they depend upon impressions obtained in haste and excitement should not be bolstered by self-serving performances of no probative value and yet strongly calculated to influence a jury of laymen not versed in the rules of evidence. On examination of the evidence in this case, held, that the identity of the defendant as the person who committed the homicide for which he was on trial was not shown with sufficient certainty to preclude a reasonable possibility of mistake. *People v. Seppi.* 62

2. *Erroneous evidence of former identification of accused.* After the defendant was arrested on a charge of homicide and nearly three months after the homicide, some of the witnesses were taken to a detective bureau and there shown seven or eight men, but one of whom, and he, the defendant, was an Italian. The men were placed in a line with their backs to the entrance of the room and the witnesses were brought in one at a time to look at them. Two of the witnesses on request, it is alleged, pointed out the defendant. One witness identified defendant as the person he saw committing the homicide and running away therefrom, and another witness identified defendant as a man he followed on his bicycle from the immediate neighborhood of the homicide, and who threw away his revolver during the pursuit. Evidence was offered by the prosecution of what occurred at the detective bureau. The evidence so received was subject to objection and exception. It was undeniably offered and received for the purpose of bolstering the testimony already given at the trial by these two witnesses in identification of the defendant, and was so treated by the district attorney and the court. Held, that the admission of this evidence was prejudicial to the defendant and ground for reversal. *Id.*

3. *Erroneous charge that motive should not be considered by jury.* Proof of motive is never indispensable to conviction for crime. Where testimony is presented on a trial which satisfies a jury that the defendant has committed a crime, it is sufficient for conviction, although no motive therefor has been shown. In determining the guilt or innocence of a defendant, however, the question of motive is always to be considered by the jury in their deliberations. It was error, therefore, for the court to charge the jury that "Motive plays absolutely no part in your deliberations." *Id.*

4. *Statutes relating to suspension of sentence and probation construed.* The statutes dealing with the subject of probation, revocation of probation and infliction of punishment which has been suspended (Code Crim. Pro. §§ 11-a and 483) must be read and construed together, and when in conflict section 11-a must control. *People ex rel. Valiant v. Patton.* 409

5. *Revocation of probation and imposition of sentence within two years from date of probation.* This writ was sued out and the release of the relator demanded on the ground that at the date when the probation was revoked and the sentence imposed, which was more than one year after the date of his conviction, the time within which said latter act could be performed had expired, and that, therefore, the sentence and the imprisonment thereunder were illegal, and this view has been sustained by the Appellate Division. Held, that this conclusion is erroneous. The fact that the trial court in placing defendant on probation omitted to fix the period for which such probation should continue does not render invalid the sentence, since, in the absence of other limitation, it would be assumed that the probationary period should not continue for more than two years, the period fixed by the statute. Moreover, the omission would not

CRIMES — *Continued.*

render the judgment void, but the sentence would be subject to correction in this respect. *Id.*

See People v. Jackson (Mem.), 545; *People v. Gaab* (Mem.), 617.

Practice of medicine without a license — a practitioner who prescribes and uses medicines for which he receives pay, not exempt from procuring a license as one engaged in practicing "the religious tenets" of his church.

See MEDICINE (PRACTICE OF).

DAMAGES.

Measure of value of franchise to fill in lands appropriated by state for canal purposes.

See CONSTITUTIONAL LAW, 4, 6.

Liability of municipal corporation for damages caused by injunction obtained by municipality and thereafter vacated by the courts.

See DEBTOR AND CREDITOR.

See INJUNCTION.

Creditor not required to surrender any part of collateral until payment has been made in full.

See SUBROGATION.

DECEDENT'S ESTATE.

1. *Proceeding under Real Property Law* (Cons. Laws, ch. 50, §§ 105, 107) *for sale of trust property by trustee thereof — Power of court under the statute to order sale of estates in remainder — When order directing such sale authorized and should be sustained.* Testator directed the trustees appointed by his will to control and pay the net income from his real estate to his widow during her life, and that no part of his real estate should be sold until after the arrival of the youngest son at the age of twenty-one years, nor until after the decease of his wife — the latter of which events has not occurred. The will devised the remainder of his estate to testator's four sons. The respondents are infant remaindermen, children of a deceased son. This proceeding, instituted by a petition, under sections 105 and 107 of the Real Property Law (Cons. Laws, ch. 50), seeks an order of the court authorizing and directing the petitioner to sell the real estate. Indisputably the conservation and existence of the trust estate and the creation of an income for the widow required the sale of the real estate. While the court does not possess, inherently, the power to order a sale or mortgaging of an infant's real property, the power may be given by the legislature. The language of the sections of the Real Property Law referred to as it now stands expresses clearly the legislative intention that the Supreme Court may, speaking generally, order a trustee to sell all the interests constituting the title in fee simple to real property of the trust estate, under the facts and conditions prescribed by them. Their provisions justified and authorized the order of the Special Term directing the sale which the Appellate Division reversed. The court does not pass upon the question as to whether or not the sections in question of the Real Property Law validly and in fact authorized an order for the sale or mortgaging of the estates in remainder of adult parties to the proceeding without their consent for the purposes specified in the statute. *Matter of O'Donnell.* 197

2. *Legal community under the law of France — Establishment — Domicile.* The French Civil Code relating to legal community provides that it "is established by the simple declarations that the

DECEDENT'S ESTATE—Continued.

persons marry under the system of community, or by the non-existence of a contract." The domicile of origin is, however, presumed to continue until a new one is acquired and the intent to change the domicile especially where such change is to a foreign country must be established, and if a widow claims legal community under the French Code it is her duty under such Code to proceed promptly as therein provided to liquidate the community. *Matter of James.*

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3. *Election and estoppel applicable to property rights under French Civil Code.* Assuming, but not deciding, that the provisions of the French Civil Code relating to legal community are applicable to subjects of the United States who have married in this country, their applicability can be modified or derogated by special stipulation. A widow in conjunction with her children may elect to waive any claim under such Code and take under the will of her husband and thereby become bound to carry out the terms thereof and the intent and purpose of the testator. *Id.*

4. *When widow estopped from claiming legal community in her husband's estate.* Testator, a citizen of this state, who married in this country, resided and died in France. By his will he left certain property situate in Europe to his wife, and certain property situate in America to his children, appointing his wife executrix. The will itself does not recognize legal community as existing between the husband and wife. In a proceeding in a French court instituted by the executrix for the delivery to her of the legacies as therein provided, all the parties in interest were represented by counsel and expressly submitted their rights to the court; the children of the testator refrained from claiming certain of their rights under the law of France, and the mother refrained from claiming her right of legal community under that law. The judgment of the court was that the will should be executed according to its form and tenor. Thereafter the will was filed in a Surrogate's Court of this state and ancillary letters testamentary granted to the executrix, and in various proceedings and actions in this and another state the executrix alleged and admitted that the American property was owned by the testator at the time of his death, who, though a resident of France, had never been legally domiciled there, and that the principal as well as the income of said property was bequeathed to and belonged to her children. In her account in the present proceeding there was no suggestion in any way that the American estate was not wholly held by her in trust for the testator's children and certain grandchildren, nor was there any claim on the part of the executrix for legal community under the French law until after the proceeding had been pending for two years, nor did she submit evidence that raised a question of fact in support of her claim of legal community. *Held,* that the law of France, so far as it relates to this case, was determined by its court, and that determination should not at this late day be repudiated. That the proceedings and judgment in France, together with the proceedings in this country, and allegations and admissions of the executrix, and the conceded and undisputed evidence taken herein, are so wholly inconsistent with any claim on her part for legal community under the French Code in antagonism to the simple terms of her husband's will as to have required a decree by the Surrogate's Court against her contention. *Id.*

Erroneous probate of will in this state upon theory that it had been admitted to probate in province of Quebec — invalidity of probate of such will because probate in province of Quebec failed

DECEDENT'S ESTATE — *Continued.*

to comply with requirements of Code of Civil Procedure and will was not properly authenticated.

See WILL, 1.

Gift of stock held by testator in manufacturing corporation — provisions of will examined and held that it was the intention of testator to give to the legatees named the specific shares of stock held by him in the manufacturing corporation named; that such legacies were not general, and that the dividends accrued on such stock should be paid to the specific legatees.

See WILL, 2.

Provisions of will, giving to testator's wife a life estate with remainder over if she remarries, construed and held that the gifts of remainder are equally conditioned upon either the death or remarriage of the widow.

See WILL, 3.

Trust estate for benefit of testator's daughter and her children — will construed and held that, the daughter and children being dead, the remainder had vested in the children and passed to their father.

See WILL, 4.

Testamentary trusts — an ulterior limitation, although invalid, will not be allowed to invalidate the primary provision, but will be cut off if the trust is not an entirety — provisions of will creating a trust construed.

See WILL, 5.

DECEDENT ESTATE LAW.

Establishment of will probated in foreign country.

See WILL, 1.

DECEIT.

Action for deceit and false representations — facts examined in action for deceit and held that it was error to reverse judgment entered on verdict of a jury.

See APPEAL, 6.

DEED.

Real property — action to set aside deed of farm from plaintiff to his nephew, made in consideration of the latter's promise to support and care for plaintiff during life — partial breach of such contract by nephew — duties and obligations of grantee — grantor entitled to lien upon premises.

See CONTRACT, 2.

DIRECTORS.

See Northern C. I. Trust v. Street (Mem.), 555.

DISBARMENT.

Proceedings for disbarment of an attorney — such proceeding not a criminal prosecution for the imposition of a penalty or forfeiture — attorney not immune from disbarment because proceeding therefor is based upon testimony on a trial in substance confessing the acts for which he is liable to disbarment — constitutional provision that no person shall be compelled to testify against himself not applicable in such proceeding.

See ATTORNEYS.

DIVORCE.

Action to recover from husband value of services of attorney for wife in actions for divorce and separation in excess of costs allowed and for moneys advanced by attorney for support of wife while alimony was unpaid — attorney not entitled to lien for services, but has a lien for money loaned to the wife upon the unpaid alimony and fine in contempt proceedings.

See HUSBAND AND WIFE.

EASEMENTS.

1. *When evidence insufficient to show that owner of easement is estopped from maintaining action to restrain obstruction.* An estoppel may arise either where the owner of an easement knowing that another, in the belief that he has the right to do so, is, at expense to himself, occupying the land over which the easement passes by building thereon or otherwise and yet stands by without objection, or where he makes representations to another with the intention that the other may act thereon or which fairly justify the other in so acting, and the other takes action upon the faith of such representations. The findings by the Appellate Division neither separately nor together state facts from which such an estoppel arises. *Andrews v. Cohn.* 148

2. *When right of way in city may be covered.* In the absence of restriction in the grant the owner of the servient tenement in a city has the right to cover a right of way so long as sufficient headroom is preserved and so long as such action does not make the use of the right of way impracticable or unreasonably inconvenient. *Id.*

See Hood v. N. Y. C. & H. R. R. Co. (Mem.), 519.

EJECTMENT.

See Town of Oyster Bay v. Stehli (Mem.), 515; Town of Smithtown v. Cruikshank (Mem.), 577

ELECTION.

Election and estoppel applicable to property rights governed by French Code.

See DECEDEDENT'S ESTATE, 3.

Election by owners to accept repairs to automobile injured by fire a bar to action on insurance policy for loss of car.

See INSURANCE, 1.

ELECTION LAW.

Section 122 constitutional — Municipal Court district in borough of Brooklyn a political subdivision.

See CONSTITUTIONAL LAW, 10.

ELECTIONS.

See Matter of Slevin (Mem.), 683; Matter of Moore v. Board of Elections (Mem.), 686; Matter of Barfield v. Board of Elections (Mem.), 687; Matter of Greenwald v. Boyle (Mem.), 688.

Office of county clerk of Queens county not required to be filled at election in year 1917.

See CONSTITUTIONAL LAW, 9.

Section 122 of Election Law constitutional — Municipal Court district in borough of Brooklyn a political subdivision.

See CONSTITUTIONAL LAW, 10.

EMINENT DOMAIN.

1. *Condemnation of land for a public highway — Damages for loss of water from well caused by construction of highway.* In a proceeding to condemn lands for a public highway, the commissioners found that a well, supplied by subterranean water, was located upon lands of the defendant owner not taken in the proceeding, and immediately adjacent to a parcel so taken; that the same became dry immediately after, and, as a direct result of the blasting done upon the parcels of the land taken, and the cut or excavation made thereon. *Held*, that the owner's damages by reason of the loss of water in his well were incident to the construction of the highway and so directly resultant therefrom that compensation for taking his lands without including therewith the damages to the well as a part of the damages to his remaining land would not be just or an adequate equivalent for his loss. *County of Erie v. Fridenberg.* 389

2. *Right to grant costs to non-resident owner of land.* The owner is a non-resident of the state and the court at Special Term refused to allow him any costs in the proceeding on the ground that it had no power. *Held*, that it was not the intention of the legislature by the amendment to section 154 of the Highway Law (Laws of 1915, ch. 497) to take away the power of the court to allow an owner costs in a condemnation proceeding under such law unless the same can be allowed pursuant to the provisions of section 3372 of the Code of Civil Procedure. That section, when made applicable to the Highway Law, should be given the same meaning and effect that it has in the Code, and not be so construed as to prevent an award of costs to an owner in a condemnation proceeding where costs may be essential to secure to him just compensation for his property. The court is not given power, however, to grant an extra allowance of costs. *Id.*

When act granting lands under water to upland owners invalid because lacking a two-thirds vote — act attempting to ratify and confirm such grants invalid because embracing subjects not expressed in title — when act granting right to fill in lands under water gives an inchoate and vested right of which grantees cannot be deprived without compensation — when part of act giving such rights is valid under Constitution so that part may be upheld although the remainder be rejected as invalid — awards to such upland owners examined and held to be incorrect — basis of award pointed out.

See CONSTITUTIONAL LAW, 1-7.

EQUITY.

Right to subrogation does not accrue until whole debt has been discharged by person seeking to be subrogated.

See SUBROGATION.

ESTATES.

Real property — proceeding under Real Property Law for sale of trust property by trustee thereof — power of court under the statute to order sale of estates in remainder — when order directing such sale authorized and should be sustained.

See DECEDEDENT'S ESTATE, 1.

Legal community under the law of France — establishment — domicile — election and estoppel applicable to property rights governed by French Code — when widow estopped from claiming legal community in her husband's estate.

See DECEDEDENT'S ESTATE, 2-4.

ESTATES — Continued.

Erroneous probate of will in this state upon theory that it had been admitted to probate in province of Quebec — invalidity of probate of such will because probate in province of Quebec failed to comply with requirements of Code of Civil Procedure and will was not properly authenticated.

See WILL, 1.

Gift of stock held by testator in manufacturing corporation — provisions of will examined and held that it was the intention of testator to give to the legatees named the specific shares of stock held by him in the manufacturing corporation named; that such legacies were not general, and that the dividends accrued on such stock should be paid to the specific legatees.

See WILL, 2.

Provisions of will, giving to testator's wife a life estate with remainder over if she remarries, construed and held that the gifts of remainder are equally conditioned upon either the death or remarriage of the widow.

See WILL, 3.

Trust estate for benefit of testator's daughter and her children — will construed and held that, the daughter and children being dead, the remainder had vested in the children and passed to their father.

See WILL, 4.

Testamentary trusts — an ulterior limitation, although invalid, will not be allowed to invalidate the primary provision, but will be cut off if the trust is not an entirety — provisions of will creating a trust construed.

See WILL, 5.

ESTOPPEL:

When widow estopped from claiming legal community in her husband's estate.

See DECEDENT'S ESTATE, 4.

When facts insufficient to show that owner of easement is estopped from maintaining action to restrain obstruction to easement.

See EASEMENTS, 1.

Election by owners to accept repairs to automobile injured by fire a bar to action on insurance policy for loss of car.

See INSURANCE, 1.

EVICTION.

Action for rent — lease of premises which included vault under sidewalk — when exclusion of tenant from such vault by municipal authorities is partial eviction of tenant and constitutes defense in action for rent.

See LANDLORD AND TENANT, 1-3.

EVIDENCE.

1. *Replevin — Gift — Action to recover possession of property claimed by plaintiff as a gift from her deceased husband — Erroneous dismissal of complaint by Appellate Division — Credibility of witnesses question for the jury.* Where the widow of a decedent brought an action of replevin against his daughter by a former marriage to recover the possession of furniture and household goods which plaintiff claimed

EVIDENCE — *Continued.*

as a gift from her deceased husband, which articles defendant also claimed as a gift, and there was evidence of such a gift to plaintiff by the testimony of several witnesses sufficient to make out a *prima facie* case, it was error for the Appellate Division on reversing the judgment for plaintiff, entered upon a verdict of a jury, to dismiss the complaint upon the ground that there was no evidence to sustain the plaintiff's claim. The credibility of the witnesses was for the jury, and even if some witnesses for plaintiff were interested, as claimed by defendant, their testimony cannot be disregarded by the court. Hence the action of the Appellate Division in dismissing the complaint cannot be sustained. *Coutant v. Mason.* 49

2. Construction and application of section 834 of Code of Civil Procedure — Action on life insurance policy — When plaintiff in proofs of death of insured refers to death certificate of a hospital physician and agrees that it shall be part of the proofs of death, such certificate is admissible in evidence upon the trial and the testimony of the attending physician is not incompetent under section 834. Section 834 of the Code of Civil Procedure is not intended to prohibit a person from testifying to such ordinary incidents and facts as are plain to the observation of any one without expert or professional knowledge, and without tacitly or otherwise inviting or receiving confidences by which the incidents or facts are or may be brought to light and obtained. The plaintiff's husband made written application to the defendant company for a policy of insurance on his life payable to the plaintiff. In his application he declared that "the said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described in this application." At the time of making such application he made a small payment to the defendant's agent and received a receipt therefor, in which it was stated that the payment "is in no way binding upon the said company except that said company agrees to return the amount mentioned herein in case the company declines to grant a policy on the life of said applicant." The policy was afterward handed to the applicant and the agent received the unpaid premium. Testimony was received from the physician who attended the deceased on the day previous to the receipt of this premium that he was then sick, and the plaintiff certified that her husband's health was first affected two days before payment of the premium. In answer to the question, "What was the cause of his death?" she referred to the death certificate made by a physician and in her certificate with reference to the death of the insured, says, "It is agreed that such certificate shall be considered as part of proof of death of insured." Held, that no error was committed in allowing the testimony given by the attending physician that deceased was sick when he attended him; that the testimony of plaintiff with reference to the death certificate of the physician made such certificate admissible in evidence as an admission against her for what it was worth and that the receipt of the proofs of death under the circumstances disclosed by the record was not error. *Klein v. Prudential Ins. Co.* 449

See Grifenhagen v. Whilden & Hancock (Mem.), 726.

Murder — evidence of identification of defendant as person who committed the crime — erroneous evidence of former identification.

See CRIMES, 1, 2.

EXAMINATION BEFORE TRIAL.

See Davidson v. City of New York (Mem.), 487.

EXCEPTIONS.

No exceptions need be taken to new findings by Appellate Division to entitle them to be reviewed in Court of Appeals.

See APPEAL, 2.

EXCISE.

Liquor tax certificate — assignment of certificate — abandonment of premises for which such certificate was granted and application to have certificate transferred to other premises — when such transfer improperly denied because certificate for premises abandoned had been issued to a new tenant thereof.

See LIQUOR TAX.

FALSE REPRESENTATIONS.

See Ball v. Gerard (Mem.), 665; de Ridder v. Gerard (Mem.), 665.

Action for deceit and false representations — facts examined in action for deceit and held that it was error to reverse judgment entered on verdict of a jury.

See APPEAL, 4-6.

FEES.

County clerks — fees — clerk of Erie county whose salary, fixed by statute, constitutes the whole compensation to be paid to him is not entitled to any part of fees payable to county clerks under Federal statutes for services in naturalization proceedings.

See COUNTIES, 2.

FINDINGS.

When Appellate Division reverses or modifies judgment of Trial Term on the facts, it must make findings necessary to support the judgment it orders.

See APPEAL, 2.

FISH AND GAME.

Conservation Law — Violation of provisions thereof forbidding the selling of game out of season — When serving of partridges as part of meal furnished by a hotelkeeper constituted violation of such provisions. A construction of the Conservation Law (Cons. Laws, ch. 65) should be adopted as appears most reasonable and best suited to accomplish its purpose. Defendant, a hotelkeeper, served with partridges two guests who were stopping with him for several days and who paid for their entertainment, stating that the partridges had been given him. The meal was served in the dining room at a table occupied by the guests, separate from the table occupied by the defendant and his wife and one of his employees, the partridges being the only meat course served. Held, that on the facts appearing by the record the partridges were sold, as matter of law and within the prohibition of the statute. *People v. Clair.* 108

FORECLOSURE.

See U. S. Trust Co. v. Martindale R. E. Co. (Mem.), 677; Seaman's Bank v. McCollough (Mem.), 692; Sheedy v. Foster (Mem.), 695.

FORGERY.

See People v. Williams (Mem.), 510.

FRANCE (LAW OF).

Legal community under law of France — establishment — when widow estopped from claiming legal community in her husband's estate.

See DECEDENT'S ESTATE, 2-4.

FRANCHISE.

Measure of value of franchise to fill in lands appropriated by state for canal purposes.

See CONSTITUTIONAL LAW, 4-6.

FRANCHISE TAX.

See People ex rel. M. & Q. Traction Corp. v. Tax Comrs. (Mem.), 583; People ex rel. City Investing Co. v. Saxe (Mem.), 585; People ex rel. Tompkins Cove Stone Co. v. Saxe (Mem.), 601.

GAME.

Conservation Law — violation of provisions thereof forbidding the selling of game out of season — when serving of partridges as part of meal furnished by a hotelkeeper constituted violation of such provisions.

See FISH AND GAME.

GAS AND ELECTRICITY.

See Kings Co. Lighting Co. v. City of New York (Mem.), 500.

GENERAL BUSINESS LAW.

Agreement by corporation to pay interest in excess of legal rate is not usurious.

See INTEREST.

GIFT.

Replevin — action to recover possession of property claimed by plaintiff as a gift from her deceased husband — erroneous dismissal of complaint by Appellate Division — credibility of witnesses question for the jury.

See EVIDENCE, 1.

GRADE (CHANGE OF).

Streets — when erection of viaduct in and above a street constitutes a change of grade for which an abutting owner may recover damages.

See NEW YORK (CITY OF), 2.

GRADE CROSSING.

See People ex rel. Shuffle v. Town of Rhinebeck (Mem.), 497; People ex rel. Dawson v. Duffey (Mem.), 594.

GUARANTY.

See Howard v. Maxwell-Briscoe Motor Co. (Mem.), 649.

Guarantor of agreement by corporation to pay interest in excess of the legal rate liable.

See INTEREST.

HABEAS CORPUS.

See People ex rel. Fish v. Smith (Mem.), 590; People ex rel. Ireland v. Woods (Mem.), 600.

HEALTH (PUBLIC).

Practice of medicine without a license — a practitioner who prescribes and uses medicines for which he receives pay, not exempt from procuring a license as one engaged in practicing "the religious tenets" of his church.

See MEDICINE (PRACTICE OF).

HIGHWAY LAW.

Condemnation of land for a public highway — damages for loss of water from well caused by construction of highway — right to grant costs in such proceeding to non-resident owner of land is not taken away by section 154 of Highway Law as amended by chapter 497 of Laws of 1915, but an extra allowance may not be granted.

See EMINENT DOMAIN, 2.

HUSBAND AND WIFE.

Action to recover from husband value of services of attorney for wife in actions for divorce and separation in excess of costs allowed and for moneys advanced by attorney for support of wife while alimony was unpaid — Attorney not entitled to lien for services, but has a lien for money loaned to the wife upon the unpaid alimony and fine in contempt proceedings. The action is for legal services rendered and moneys loaned by plaintiff's assignor to a wife in matrimonial controversies with her husband. The money was loaned to maintain her when the husband left her destitute. Thereafter, husband and wife secretly came together and settled their differences. The wife received a sum of money in discharge of the husband's liability under an order which had been made fining him for contempt, and a further sum for costs and alimony under the final judgment. All this is found to have been done collusively and in fraud of the attorney's rights. The plaintiff has been paid all the counsel fees awarded him by order of the court, but the value of the services is found to be greatly in excess of the award. Both husband and wife are defendants. The plaintiff and the husband appeal. Held, that the excess cannot be recovered from the husband; that the award made became, with the costs of the action, the measure of the rights of the wife and of her husband's obligation. The motion to punish the husband for contempt was not in a special proceeding but was made in the action. It was, therefore, covered by the orders and no extra compensation can be allowed against him. The fine in the contempt proceedings was a substitute for unpaid alimony and as such is not subject to a lien for counsel fees. Equity confines this fund to the purposes of its creation and declines to charge it with liens which would absorb and consume it. The plaintiff has a lien for money loaned, under an agreement that it should be secured by a lien, for the support of the destitute wife. To the extent of his advances to the wife, he was subrogated to the remedy against the husband. *Turner v. Woolworth.*

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See La Moutte v. Title G. & S. Co. (Mem.), 690.

Legal community under the law of France — establishment.

See DECEDENT'S ESTATE, 2.

Transfer tax — personal property owned by husband and wife as joint tenants — upon death of husband his undivided half interest therein passes to his wife and is subject to a transfer tax as if it had been bequeathed by will — the undivided half interest of the wife not taxable.

See TAX, 1.

INJUNCTION.

Damages — Liability of municipal corporation for damages caused by injunction obtained by municipality and thereafter vacated by the courts — Contents of the order granting the injunction. There was no liability at common law for damages resulting from an injunction erroneously granted save in cases of malicious prosecution. The Code requirements for security upon application for provisional remedies must be

INJUNCTION — *Continued.*

read in the light of the rule at common law, and invariably the undertaking required is limited to a sum specified by the court or judge. Special rules apply, however, to provisional remedies granted at the instance of municipal corporations. In such cases no security was required, but an amendment in 1894 to section 1990 of the Code of Civil Procedure modified the exemption so as to require that where a municipal corporation is excused from giving security on obtaining an injunction, such corporation shall be liable for all damages that may be sustained by the opposite party by reason of such order or injunction in the same case and to the same extent as sureties to an undertaking would have been if such an undertaking had been given. Sureties would be liable, however, to an extent not greater than the sum specified by the court or judge. The court or judge must, therefore, prescribe in the order of injunction the maximum extent to which a municipal corporation shall be liable. If the amount stated is too low, the defendant may move to increase it. Until some amount is stated, there is no liability on the part of the municipality. *City of Yonkers v. Federal Sugar Refg. Co.* 206

Right of carpenters' brotherhood or union to refuse to use woodwork made by non-union manufacturers — when the sending by representatives of such union of notices to members of the union and to building contractors not to use such woodwork is not illegal — injunctions will not be granted to restrain such acts where there are no findings of malice or intent to injure the good will or business of the plaintiffs or non-union manufacturers.

See LABOR UNIONS.

INSURANCE.

1. *When agreement by owners to accept repairs to automobile injured by fire a bar to an action on insurance policy for total loss of car.* Defendant insured plaintiff's automobile truck for \$2,500. It having been badly damaged by fire defendant offered to settle the claim for \$2,000 or repair the car, which latter offer was accepted by plaintiffs provided they were not delayed too long, whereupon the car was taken by defendant for the purpose of making repairs thereon. Plaintiffs remained silent and permitted defendant to complete the repairs. They made no complaint that the work was unreasonably delayed or that the car when repaired was not as good as it was before the fire. When defendant tendered the truck to them and offered to deliver it free of expense they remained silent for upwards of five months, when they commenced this action to recover \$2,500 under the policy for a total loss of the car. Held, that the election of plaintiffs to have the car repaired, and the undertaking of defendant to make the repairs within a reasonable time, created a contractual relation between the parties which terminated all rights of both parties under the policy contract. Such substituted contract deprived defendant of asserting any rights or option it had under the policy and deprived plaintiffs under the circumstances of any right to assert a claim under the policy. The only remedy, if any, either party thereafter had was for breach of the new or substituted contract. *Gaffey v. St. Paul F. & M. Ins. Co.* 113

2. *Cancellation of policy — When notice of cancellation of fire insurance policy given by insured and received by insurer effective, although insurer took no action with reference thereto until after loss by fire — Construction and application of section 122 of Insurance Law (Cons. Laws, ch. 28) relating to cancellation of policies of fire insurance.* Where notice of cancellation of a fire insurance policy is received by an insurer from an assured prior to a loss thereunder, the policy is *ipso facto* terminated.

INSURANCE — Continued.

A surrender of the policy by the assured, or return of unearned premium by the insurer, is not a condition precedent to a termination of the policy contract. *Held*, the notice of cancellation in this case complied with the requirements of the Insurance Law, section 122; hence the policy was not in force at the time of the loss. *Gately-Haire Co. v. Niagara F. Ins. Co.* 162

See Pixley v. C. T. Mut. Ac. Assn. (Mem.), 545; *Automatic Sprinkler Co. v. Employers' Liability Assur. Corp.* (Mem.), 552; *Casualty Co. v. U. S. Casualty Co.* (Mem.), 560; *Gately-Haire Co. v. Ins. Co. of the State of Pennsylvania* (Mem.), 589; *Silverstein v. Standard Accident Ins. Co.* (Mem.), 601; *Gallagher v. Fidelity & Casualty Co.* (Mem.), 664; *Lawrence v. Stuyvesant Ins. Co.* (Mem.), 676; *Holland Laundry v. Travelers Ins. Co.* (Mem.), 698; *Blakeslee, Perrin & Darling v. Ocean A. & G. Corp.* (Mem.), 706.

Action on life insurance policy — when plaintiff in proofs of death of insured refers to death certificate of a hospital physician and agrees that it shall be part of the proofs of death, such certificate is admissible in evidence upon the trial and the testimony of the attending physician is not incompetent under section 834.

See EVIDENCE, 2.

Cancellation of policy covering liability of an employer for accidents to his employees — jurisdiction of state industrial commission to determine whether employers' liability policy had been duly canceled by insurance company before an accident to an employee — erroneous decision by commission that notice of cancellation was ineffectual because name and post office of insured were misspelled.

See WORKMEN'S COMPENSATION, 6.

INSURANCE LAW.

Construction and application of section 122 relating to cancellation of policies of fire insurance.

See INSURANCE, 2.

INTEREST.

In absence of an interdicting statute parties may agree that a rate of interest, exceeding the legal rate, shall be paid — Agreement to pay interest at a certain rate before a loan is due and a greater rate thereafter is an agreement to pay interest not a penalty — Agreement by a corporation to pay interest in excess of the legal rate is not usurious, and the guarantor of such contract is liable thereon. In the absence of an interdicting statute, the lender and borrower may agree that a rate of interest, other than the rate fixed as the legal rate by a statute, shall be paid from the date to either the maturity or the payment of the loan. An agreement to pay interest upon a loan from its date until its payment at a rate before and a different rate after its maturity is an agreement to pay interest and not a penalty as to the latter rate. An agreement by a corporation to pay interest beyond the legal rate is not usurious (General Business Law [Cons. Laws, ch. 20, §§ 370, 371, 373, 374]), and a guarantor of the contract is liable thereon within the obligations of his guaranty. *Union Estates Co. v. Adlon Constr. Co.* 183

INTERPLEADER.

See Brown v. City Nat. Bank (Mem.) 678.

INTERPRETATION.

Part of statute should not be construed by itself.

See STATUTES, 1.

Intention of lawgiver is to be sought first.

See STATUTES, 2.

Changes in arrangement of sections will not work change of meaning.

See STATUTES, 3.

JOINT TENANCY.

Transfer tax — personal property owned by husband and wife as joint tenants — upon death of husband his undivided half interest therein passes to his wife and is subject to a transfer tax as if it had been bequeathed by will — the undivided half interest of the wife not taxable.

See TAX.

JUDGMENT.

See Matter of Merchants' Bank v. Miller (Mem.), 490.

Judgment or order on appeal to Appellate Division — power of Appellate Division to review the facts and render a new final judgment in cases of contract and in tort cases — when Appellate Division has the power to reduce the verdict and grant judgment for a smaller amount.

See APPEAL, 1.

Judgment entered upon order of Appellate Division dismissing complaint is final judgment of that court and appealable direct to the Court of Appeals.

See APPEAL, 3.

JUDICIAL SALE.

Cannot be attacked upon the ground of a subsequent change in interpretation of law.

See SALE.

JURISDICTION.

Court of Claims has not jurisdiction to hear claim against state where no notice of intention to file claim has been filed.

See STATE, 1.

Filing of claim not equivalent to filing of notice of intention to file claim.

See STATE, 2.

KIDNAPPING.

See People v. Milone (Mem.), 625.

LABOR LAW.

See People v. Stevens Co. (Mem.), 622.

LABOR UNIONS.

Injunction — Right of carpenters' brotherhood or union to refuse to use woodwork made by non-union manufacturers — When the sending by representatives of such union of notices to members of the union and to building contractors not to use such woodwork is not illegal — Injunctions will not be granted to restrain such acts where there are no findings of malice or intent to injure the good will or business of the plaintiffs or non-union manufacturers. The voluntary adoption by an association of employees of reasonable rules relating to persons for whom and conditions under which its members shall work is not illegal at

LABOR UNIONS — *Continued.*

common law. Neither is the enforcement of such rules by the association through fines or by expulsion from the association illegal. Workingmen may organize for purposes deemed beneficial to themselves and in that organized capacity may determine that their members shall not work with non-members or upon specified work or kinds of work. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action. A strike or boycott may be legal or illegal according to the acts involved therein. So an action for a direct and primary purpose in the interest of individuals or a combination of individuals taken in good faith to advance the interest of the individuals or combination may be useful, while a remote and secondary action which carries with it a degree of malice as a matter of law is illegal. Plaintiffs operated an open shop for the manufacture of woodwork for houses and other buildings, and defendants were officers of a brotherhood or voluntary association of carpenters and joiners. The association adopted rules prior to any strike against the plaintiffs' materials that its members should not work on the products of any mill employing non-union men, and from time to time it circulated letters to contractors stating that in order to avoid labor troubles they were requested to stipulate for the employment of union men and union-made trim and other shop-made carpenter work, and that unless such materials were constructed under strict union conditions they would refuse to handle it, and that stipulating in the contracts that the trim must bear the union label would avoid all complications. The defendants having attempted to enforce the rules of the brotherhood against its members handling non-union made woodwork trim, this action was brought by the plaintiffs to obtain an injunction against the defendants taking action affecting the plaintiffs and the building material made in their mills. The courts below gave judgment perpetually enjoining the defendants from sending such letters to the plaintiffs' customers or inducing any person to refrain from working on material not bearing the union label. The findings of fact are that the rules of the association were adopted antedating any strikes against plaintiffs' material and that they were not adopted with the plaintiffs in view, but were intended to apply generally to all non-union mills; that they were adopted to increase wages and shorten hours of labor and to benefit the material condition of the members of the association, and had that effect in their enforcement; that the non-union mills, including that of the plaintiffs, compete in their products with the mills manned by the members of said United Brotherhood; that members of the brotherhood quit work on all jobs complained of because of their rules to work only on union material made by their own members, and of their own volition; that no labor contracts were violated and no violence or threat of violence, and that in all matters complained of they acted against all non-union employers without malice towards the plaintiffs. It also appears that it was not the intent and purpose of the defendants to injure the good will or business of the plaintiffs as individuals or of non-union manufacturers generally. Held, that the facts do not support the judgment. *Bossert v. Dhuy.* 342

See Newton Co. v. Erickson (Mem.), 632.

LANDLORD AND TENANT.

1. *Covenant for quiet enjoyment will be read into lease.* The rule that a covenant for quiet enjoyment will be read into a lease has become a settled rule of property and is not changed by the provisions of the Real Property Law. *Fifth Ave. Bldg. Co. v. Kernochan.* 370

LANDLORD AND TENANT — Continued.

2. *Lease of premises including vault under sidewalk — When exclusion of tenant from vault by municipal authorities is partial eviction and constitutes defense in action for rent.* This action is for rent of premises where the terms of the lease included a vault under a sidewalk which was maintained under a revocable lease from the city of New York. The city revoked the license and excluded the tenant from the vault, first from the whole vault and later from part of it. The defense is a partial eviction, with a demand that the rent abate in proportion to the diminished rental value. The landlord insists that in the absence of a covenant for quiet enjoyment, eviction is not a defense. *Held*, that eviction as a defense to an action for rent does not depend upon such a covenant, either express or implied; that an actual eviction suspends the obligation of payment either in whole or in part because it involves a failure of the consideration for which rent is paid. *Id.*

3. *Inference not permissible that ouster by city was by implication excepted from covenant for quiet enjoyment.* The space within the highway was more than an incident or an appurtenance. It was the subject-matter of the grant. Hence it was also the subject-matter of the covenant, and the inference is not permissible that ouster by the city was by implication excepted from the covenant. *Id.*

See Hotel Holding Co. v. Wetherbee & Wood (Mem.), 531.

Mechanics' liens — agreement by landlord to contribute specified sum of cost of improvements being made to leased premises by tenant thereof — failure of tenant to comply with lease and conditions of agreement — extent to which landlord is liable upon mechanics' liens for work done in compliance with agreement.

See LIENS, 2.

LARCENY.

See People v. Scudder (Mem.), 670.

LEASE.

See Howard v. Hoffeld (Mem.), 546; Pratt v. Prentice (Mem.), 707; Mecca Realty Co. v. Kellogg T. C. F. Co. (Mem.), 724.

Covenant for quiet enjoyment will be read into lease — lease of premises including vault under sidewalk — when exclusion of tenant from vault by municipal authorities is partial eviction and constitutes defense in action for rent — inference not permissible that ouster by city was by implication excepted from covenant for quiet enjoyment.

See LANDLORD AND TENANT, 1-3.

Agreement by landlord to contribute specified sum of cost of improvements being made to leased premises by tenant thereof — failure of tenant to comply with lease and conditions of agreement — extent to which landlord is liable upon mechanics' liens for work done in compliance with agreement.

See LIENS, 2.

LEGAL COMMUNITY.

When widow estopped from claiming legal community in her husband's estate.

See DECEDENT'S ESTATE, 2-4.

LEGISLATURE.

Legislative grant to fill in and erect docks on land under water requires a two-thirds vote.

See CONSTITUTIONAL LAW, 1, 2.

LIBEL.

See Palmer v. Dunkirk Printing Co. (Mem.), 599.

LIEN LAW.

Requirement that assignment of moneys due on a contract should be filed in the proper county clerk's office — what creditors may not invoke such provision.

See LIENS, 1.

When tenant in making improvements not a contractor within meaning of Lien Law.

See LIENS, 2.

LIENS.

1. *Mechanics' liens — Requirement that assignment of moneys due on a contract should be filed in the proper county clerk's office — What creditors may not invoke such provision.* Section 15 of the Lien Law relating to mechanics' liens (Cons. Laws, ch. 33), in effect providing that an assignment by a contractor of sums of money due or to grow due upon his contract shall be invalid unless filed in the office of the clerk of the county where the real property is situated, cannot be invoked for the benefit of one having a judgment against the contractor for damages for personal injuries or an attaching creditor of such contractor. *Edison Elec. Ill. Co. v. Frick Co.* 1

2. *Mechanics' liens — Agreement by landlord to contribute specified sum of cost of improvements being made to leased premises by tenant thereof — Failure of tenant to comply with lease and conditions of agreement — Extent to which landlord is liable upon mechanics' liens for work done in compliance with agreement.* Tenants in common, lessor and lessee, vendor and purchaser, all have interests in the land; but when once they have given their consent to an improvement they cannot by any arrangement among themselves cut off the rights of lienors. The owners of certain real property leased it for a term of years to a tenant who desired improvements made, for which purpose the owners agreed to contribute a sum named conditioned upon payment of the rent and upon certain improvements being made as therein set forth. The tenant did not comply with the terms of this agreement and failing to pay the rent was dispossessed and the owners put to heavy loss in completing the improvements. This litigation involves the adjustment of the claims of lienors who supplied material to the tenant. *Held, first,* that the tenant in making these improvements was not a contractor within the meaning of the Lien Law (Lien Law, §§ 2, 3, 4; Consol. Laws, ch. 33). *Second,* so far as the liens are confined to work called for by the lease, they were properly allowed. Within those limits the landlords' estate may be charged to the same extent as if the owners of that estate had ordered the work themselves. In substance, they have made the lessee their agent for that purpose. *Third,* so far as the material was used in alterations not called for by the lease, the liens have been properly rejected. *McNulty Brothers v. Offermann.* 98

See Schmidt v. Hertz (Mem.), 532; Carpenter v. N. Y. Trust Co. (Mem.), 614.

Real property — action to set aside deed of farm from plaintiff to his nephew, made in consideration of the latter's promise to support and care for plaintiff during life — partial breach of such contract by nephew — duties and obligations of grantee — grantor entitled to lien upon premises.

See CONTRACT, 2.

LIENS — *Continued.*

Action to recover from husband value of services of attorney for wife in actions for divorce and separation in excess of costs allowed and for moneys advanced by attorney for support of wife while alimony was unpaid — attorney not entitled to lien for services, but has a lien for money loaned to the wife upon the unpaid alimony and fine in contempt proceedings.

See HUSBAND AND WIFE.

LIMITATION OF ACTIONS.

See Neun v. Bacon Co. (Mem.), 691; R. I. Butter Co. v. Rowland (Mem.), 720.

LIQUOR TAX.

Assignment of certificate — Abandonment of premises for which such certificate was granted and application to have certificate transferred to other premises — When such transfer improperly denied because certificate for premises abandoned had been issued to a new tenant thereof. A liquor tax certificate authorizing traffic in liquors at a place therein named passed by assignment with all the rights appertaining thereto to plaintiff, and the original holder of the certificate surrendered possession of the premises on which the business was carried on to his landlord. The next day a lessee of the premises obtained from the proper authorities a certificate to traffic in liquor therein. The plaintiff on the same day gave notice of the abandonment of the right there to traffic in liquors, and at the same time presented the necessary papers to have the original certificate transferred to other specified premises in the same city, which application was denied by the excise department on the ground that a certificate had been granted the lessee of the premises in question. Plaintiff brings this action in equity to revoke and cancel the certificate issued to the tenant who succeeded to the occupancy of the premises. Held, that the action can be maintained; that the certificate issued to the tenant had no validity, and that plaintiff's application to transfer the certificate issued to plaintiff's assignor should have been granted. (Liquor Tax Law [Cons. Laws, ch. 34], § 8, subd. 9, amd. L. 1911, ch. 298; § 27, subd. 2, amd. L. 1910, ch. 503.) *Citizens Brewing Corp. v. Lighthall.* 71

See Matter of Sisson (Mem.), 494; Pietronis v. Dobler Brewing Co. (Mem.), 544.

LIQUOR TAX LAW.

See People v. McVea (Mem.), 623.

Liquor tax certificate — assignment of certificate — abandonment of premises for which such certificate was granted and application to have certificate transferred to other premises — when such transfer improperly denied because certificate for premises abandoned had been issued to a new tenant thereof.

See LIQUOR TAX.

MANDAMUS.

See Matter of Hendrix (Mem.), 618.

MARRIAGE SETTLEMENT.

Consideration — agreement between father and prospective husband of his daughter to pay daughter certain sum annually — when daughter, although not a party to the contract, may enforce contract and recover unpaid installment.

See CONTRACT, 3.

MASTER AND SERVANT.

1. *Action for wrongful discharge — When facts do not justify discharge — Erroneous reversal by Appellate Division of judgment for plaintiff rendered upon the verdict of a jury — Bad motive or ignorance of adequate reason immaterial.* Where the facts, in an action brought to recover damages for plaintiff's wrongful discharge from defendant's employment, present a close case but not a clear case, defendant must reasonably satisfy a jury that plaintiff was guilty of misconduct justifying his discharge. Where plaintiff, a sales agent selling silverware for a manufacturing corporation on commission, was furnished with an office or sample room on the tenth floor of an office building with a helper, who had been employed for two years, and such helper, who had been instructed by plaintiff to deliver some trunks of samples to an express company, left them unguarded in the hall of the building and they were stolen before the express wagon arrived, and thereupon the defendant discharged plaintiff, such discharge was not justified as matter of law. Upon the evidence, plaintiff was entitled to go to the jury, and the order of the Appellate Division reversing a judgment for plaintiff rendered upon the verdict of the jury should be reversed. Bad motive for strict insistence on legal rights, or even ignorance of a sufficient cause at the time of discharge, does not preclude an employer from justifying its act in discharging an employee. *Getty v. Williams Silver Co.* 34

2. *When master not liable for alleged incompetence of servant.* A recovery cannot be had in an action by an employee against his employer for injuries sustained by reason of incompetence of a fellow-servant because of the inability of the latter to understand the English language, where this fact was not shown to be the proximate cause of the injury and it does not appear that the master was otherwise chargeable with knowledge of his lack of sufficient intelligence. *Barber v. Smeallie.* 407

Pleading — demurrer — common-law action for negligence — when cause of action therein not barred by Workmen's Compensation Law.

See NEGLIGENCE, 1.

Proximate cause of accident — when master not liable for injury to employee from fall of cases of beer piled in tiers on floor where he was working.

See NEGLIGENCE, 3.

Scaffold — injury to plaintiff by fall of platform or scaffold — facts examined and held that structure which fell was a scaffold.

See NEGLIGENCE, 4.

Workman injured by cause plainly visible — when he cannot recover on ground that defendant should have taken precautions to prevent accident.

See NEGLIGENCE, 5.

Death of night watchman employed by corporation engaged in hazardous occupation — when widow of deceased watchman entitled to compensation although there is no evidence showing how death of watchman was caused.

See WORKMEN'S COMPENSATION, 1.

Superintendent of apartment house injured by fall from stepladder while making ordinary repairs not entitled to compensation.

See WORKMEN'S COMPENSATION, 2.

MASTER AND SERVANT — *Continued.*

The president and principal executive officer of a corporation, engaged in a hazardous occupation, not an "employee" entitled under the statute, to compensation for injuries received while assisting other employees in performing manual labor.

See WORKMEN'S COMPENSATION, 3.

Industrial commission must pass upon nature of employment of injured employee if it is contended and shown by any evidence that he was employed in interstate, instead of intrastate, commerce.

See WORKMEN'S COMPENSATION, 4.

Workman having a general and special employer — when person injured may look to either or both for compensation.

See WORKMEN'S COMPENSATION, 5.

Workmen's Compensation Law — when superintendent of apartment house not entitled to compensation for injuries caused by fall of a radiator which he was moving.

See WORKMEN'S COMPENSATION, 7.

Workmen's Compensation Law — meaning and application of term "employee" in section 3 of law as amended by chapter 622 of Laws of 1916 — when bricklayer doing repair work for printing company whose business is hazardous under the law is entitled to compensation for injury received while engaged in repairing its plant.

See WORKMEN'S COMPENSATION, 8.

Workmen's Compensation Law — when industrial commission must determine nature of employment, whether pertaining to intra-state or interstate commerce.

See WORKMEN'S COMPENSATION, 9.

When employer engaged in forestry and logging for pecuniary gain.

See WORKMEN'S COMPENSATION, 10.

MECHANIC'S LIEN.

See Painted Post Lumber Co. v. Barth (Mem.), 675; Amana v. Carvel (Mem.), 716; Fanning v. Belle Terre, Inc. (Mem.), 717; Vogel Co. v. Backer Construction Co. (Mem.), 722.

Requirement that assignment of moneys due on a contract should be filed in the proper county clerk's office — what creditors may not invoke such provision.

See LIENS, 1.

Agreement by landlord to contribute specified sum of cost of improvements being made to leased premises by tenant thereof — failure of tenant to comply with lease and conditions of agreement — extent to which landlord is liable upon mechanics' liens for work done in compliance with agreement.

See LIENS, 2.

MEDICINE (PRACTICE OF).

Practice of medicine without a license — A practitioner who prescribes and uses medicines for which he receives pay, not exempt from procuring a license as one engaged in practicing "the religious tenets" of his church. A person who has no license to practice medicine, but, claiming to treat patients and cure diseases by means of the religious tenets of the spiritualistic church, uses liniments and prescribes medicines

MEDICINE (PRACTICE OF) — *Continued.*

for internal use, which are compounded and patented by himself, for which he receives pay, is not exempt from the statute (Public Health Law, Cons. Laws, ch. 45, § 173) prohibiting the practice of medicine without a license, as one engaged in "the practice of the religious tenets of any church." While a healer inculcates the faith of his church as a method of healing he is immune, but when, as in this case, he goes beyond that, puts his spiritual agencies aside and takes up the agencies of the flesh by the use of remedies operating physically, his immunity ceases and a verdict convicting him of the illegal practice of medicine is sustained by the evidence. *People v. Vogelgesang.* 290

See People v. Ames (Mem.), 509; *People v. Stark* (Mem.), 652.

MEDICINE (UNLAWFUL SALE).

See People v. Sellaro (Mem.), 662.

MONEY HAD AND RECEIVED.

See Barcolo Mfg. Co. v. Maldonado & Co. (Mem.), 499; *Venner Co. v. Southern Ry. Co.* (Mem.), 593.

MORTGAGE.

See Griffing v. Vanderbilt (Mem.), 534.

MOTIONS AND ORDERS.

When motion to dismiss complaint for failure to state cause of action sufficiently definite though not pointing out particular defect relied on.

See TRIAL, 2.

MOTIVE.

Erroneous charge that motive should not be considered by jury on trial for murder.

See CRIMES, 3.

MOTOR VEHICLES.

When agreement by owners to accept repairs to automobile injured by fire a bar to an action on insurance policy for total loss of car.

See INSURANCE, 1.

MUNICIPAL CORPORATIONS.

Liability of municipal corporation for damages caused by injunction obtained by municipality and thereafter vacated by the courts — contents of the order granting the injunction.

See INJUNCTION.

MURDER.

See People v. Jazra (Mem.), 485; *People v. Solomon* (Mem.), 502; *People v. Walden* (Mem.), 521; *People v. Schuster* (Mem.), 624; *People v. Calabrese* (Mem.), 624.

Evidence of identification of defendant as person who committed the crime — erroneous evidence of former identification — motive for crime — erroneous charge by court that motive should not be considered by jury.

See CRIMES, 1-3.

NEGLIGENCE.

1. *Master and servant — Pleading — Demurrer — Common-law action for negligence — When cause of action therein not barred by Workmen's Compensation Law.* Where, in an action brought by the plaintiff to recover from the defendant, a corporation, damages for injuries

NEGLIGENCE — Continued.

received when plaintiff was engaged in his duties as an employee, the complaint alleges a cause of action for negligence at common law and does not allege or disclose that plaintiff, or his employer, was engaged in any hazardous occupation within, or subject to, the provisions of the Workmen's Compensation Law (Cons. Laws, ch. 67), the question as to whether the plaintiff, by reason of said law, is barred from the right to recover is not presented, and a demurser to the complaint cannot be sustained upon the ground that the remedy provided in the Compensation Law is exclusive. *Nilsen v. American Bridge Co.* 12

2. *Person struck by approaching trolley car while crossing a street — Duty to look for and see such car when there are no obstructions to the view.* A judgment for plaintiff rendered on the verdict of a jury should be reversed where it is based on plaintiff's testimony that as she was about to cross a railroad track she looked in the direction of an approaching car which was in full view and did not see it, since the statement is incredible as a matter of law. *Weigand v. United Traction Co.* 39

3. *Master and servant — Proximate cause of accident — When master not liable for injury to employee from fall of cases of beer piled in tiers on floor where he was working.* In this action, brought by a servant to recover damages for injuries received through alleged negligence of the master, it appears that plaintiff, a driver of a delivery wagon for defendant, was injured by the falling of cases of beer which were piled in tiers along the driveway where he was engaged in counting the cases in the wagon which was being loaded by other employees. The evidence did not disclose that the manner in which the cases were piled, or an act of the employee in removing the cases, caused the falling. The claim of the plaintiff is that it was caused by a defective floor under the tiers of cases. There is no proof as to how or why the condition of the boards caused the section to fall. Applying the rule that a causal connection must be shown between the defect complained of and the injury sustained, the evidence is insufficient to constitute a cause of action. *Schmidt v. Michel Brewing Co.* 228

4. *Master and servant — Scaffold — Injury to plaintiff by fall of platform or scaffold — Facts examined and held that structure which fell was a scaffold.* The action is brought by the plaintiff to recover damages for personal injuries occasioned, as he charges, by the negligence of the defendant. The plaintiff was a plasterer employed by the defendant in the construction of a building. In order to do his work it was necessary to have a scaffold, platform or other similar structure to stand upon. Accordingly, the defendant's foreman furnished and placed in position two wooden horses about three and one-half feet high with two planks laid thereon. The plaintiff and his son got upon the structure thus provided and went to work. The son finished work first, and as he jumped to the floor he in some way overthrew the scaffold and the plaintiff fell, striking his shoulder and so received injuries for which he has recovered in this action. Held, that the structure was a scaffold, and that there was evidence from which the jury could have found that the wooden horses which supported the planks on which the plaintiff stood were unsafe. *Storrier v. Mosier & Summers.* 237

5. *Workman injured by cause plainly visible — When he cannot recover on ground that defendant should have taken precautions to prevent accident.* A transom over the door of defendant's garage, hung from the ceiling by hinges, with a sliding bolt at each end by which it could be immovably closed, which hinges and bolts are plainly visible, is not in itself a dangerous appliance and creates no trap or pitfall, and

NEGLIGENCE — *Continued.*

where a window cleaner of long experience, who had cleaned this transom each week for a period of nine months, placed his ladder against the transom, for the purpose of cleaning it, while it was unfastened, and it swung inward, causing the ladder to so move that plaintiff fell and was injured, he cannot recover on the ground that it was the duty of the defendant to have securely fastened the transom before he began to wash it and that failure so to do constituted negligence. *McLean v. Studebaker Bros. Co.* 475

See *McHarg v. Adt* (Mem.), 510; *Heissenbuttel v. Meagher* (Mem.), 511; *Fontanella v. N. Y. C. & H. R. R. Co.* (Mem.), 516; *Bowman v. Stewart* (Mem.), 520; *Woodward v. N. Y. Rys. Co.* (Mem.), 538; *Hallock v. Erie R. R. Co.* (Mem.), 541; *Flynn v. Bradley Cont. Co.* (Mem.), 549; *Burnett v. Erie R. R. Co.* (Mem.), 549; *Warren v. N. Y. C. & H. R. R. R. Co.* (Mem.), 558; *Swartwood v. Lehigh Valley R. R. Co.* (Mem.), 561; *Spaven v. Talbot Co.* (Mem.), 566; *Miele v. Rosenblatt* (Mem.), 567; *Swanson v. Von Hoveling A. C. Co.* (Mem.), 568; *City of New York v. Hearst* (Mem.), 671; *Cream of Wheat Co. v. Knowlton* (Mem.), 672; *Shuart v. Erie R. R. Co.* (Mem.), 680; *Doyle v. Atlantic Stevedoring Co.* (Mem.), 689; *Koehe v. Hotel Astor* (Mem.), 692; *Hart v. McKeever* (Mem.), 697; *Griswold v. Ringling* (Mem.), 707; 705; *Larkin Co. v. Terminal Warehouse Co.* (Mem.), 707; *Middlebrook v. B. & M. Railroad* (Mem.), 711; *Percippe v. Manee* (Mem.), 713; *Penfold v. Larkin* (Mem.), 714; *Hess v. International Ry. Co.* (Mem.), 718; *Candee v. Penn. R. R. Co.* (Mem.), 723.

When master not liable for alleged incompetence of servant.

See MASTER AND SERVANT, 2.

NEW YORK CITY CHARTER.

Summary dismissal of deputy tax commissioner improper.

See CIVIL SERVICE, 2.

Street opening proceedings — provisions of charter that abutting owners who cede lands from front of lot to center of street without compensation shall not be chargeable with any expense of opening the street except their proportion of damages for buildings taken or injured by the changes made in opening the street.

See NEW YORK (CITY OF), 1.

NEW YORK (CITY OF).

1. Street opening proceedings — Provisions of charter that abutting owners who cede lands from front of lot to center of street without compensation shall not be chargeable with any expense of opening the street except their proportion of damages for buildings taken or injured by the changes made in opening the street. The validity of the sections of the charter of the city of New York allowing assessments for damages awarded by reason of a future contemplated change of grade cannot be questioned on constitutional grounds. As to the persons affected by a street opening proceeding in that city who have not appealed, the report of the commissioners of assessment is final and conclusive. (Charter, § 998.) Section 992 of the Greater New York charter, as amended by chapter 548 of the Laws of 1910, provides that the owners of land improved within the proposed street and extending to the center line thereof may without compensation and before the appointment of commissioners convey their right, title and interest therein to the city of New York, and that after such cession "the lands fronting on that portion of the streets so conveyed, and extending to the center

NEW YORK (CITY OF) — *Continued.*

of the block on either side of such portion of said street so conveyed, shall not be chargeable with any portion of the expense of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid." Under this provision as construed in connection with section 980 of the charter, an assessment can be made against a person ceding land for a proposed street with respect to buildings injured by the opening or regulation of the street although not actually taken. *Matter of City of N. Y. (Tibbett Ave.).* 127

2. Change of grade — When erection of viaduct in and above a street constitutes a change of grade for which an abutting owner may recover damages. Where a viaduct, built through a street of the city of New York between two points higher than the street, consists of a floor or roadway sixty-three feet in width supported on a double row of columns set ten feet from the curb lines, and from fifty to fifty-eight feet above the surface of the street, so that access to the roadway carried by the viaduct is denied to an abutting owner, the erection of such viaduct constitutes a change of grade of the street, for which such owner whose property is injured thereby may recover damages under the provisions of the New York Consolidation Act and Greater New York charter, which make it the duty of the assessors where the established grade north of Sixty-second street of any street "shall be changed or altered in whole or in part," to estimate the damages suffered by abutting owners and to make an award therefor. *People ex rel. Crane v. Ormond.* 283

Summary dismissal of deputy tax commissioner violative of city charter.

See CIVIL SERVICE, 2.

Statute abolishing office of coroner not in conflict with State Constitution.

See CONSTITUTIONAL LAW, 8.

Municipal Court district in borough of Brooklyn a political subdivision.

See CONSTITUTIONAL LAW, 10.

NOTICE.

Notice of intention to file claim against state must be given pursuant to statute.

See STATE, 1.

Filing of claim not equivalent to filing of notice of intention to file claim.

See STATE, 2.

OFFICERS.

See Matter of Carp (Mem.), 643.

Office of county clerk of Queens county not required to be filled at election in year 1917.

See CONSTITUTIONAL LAW, 9.

Public officers — repayment of costs and expenses incurred by public officer in successfully defending himself against charges of misconduct — constitutionality of the statute (County Law, § 240, subd. 16) providing therefor.

See COUNTIES, 1.

OFFICERS — *Continued.*

County clerks — fees — clerk of Erie county whose salary, fixed by statute, constitutes the whole compensation to be paid to him is not entitled to any part of fees payable to county clerks under Federal statutes for services in naturalization proceedings.

See COUNTIES, 2.

Public officers — bonds given by official having custody of village funds — liability upon general bond not affected by fact that another bond was given for the specific fund for the loss of which recovery is sought.

See SURETY BONDS.

PARENT AND CHILD.

Marriage settlements — consideration — agreement between father and prospective husband of his daughter to pay daughter certain sum annually — when daughter, although not a party to the contract, may enforce contract and recover unpaid installment.

See CONTRACT, 3.

PARTIES.

See People ex rel. N. Y. C. R. R. Co. v. Block (Mem.), 652.

PARTITION.

See Appell v. Appell (Mem.), 602; Andrews v. Kirk (Mem.), 641.

PARTNERSHIP.

See Jarvie v. Arbuckle (Mem.), 523, 524; Smith v. Jamison (Mem.), 526.

PENAL LAW.

§ 280 — Corporations prohibited from practicing law.

See TAX, 2.

§ 584 — Disbarment not a penalty or forfeiture within meaning of statute.

See ATTORNEYS.

PERSONAL PROPERTY LAW.

Sales of goods.

See CONTRACT, 1.

Loss of goods shipped by express — failure of vendor to state value of goods — when vendor cannot compel buyer to pay for goods shipped to take place of goods lost.

See VENDOR AND VENDEE, 1.

PHOTOGRAPHS.

Unfair competition in trade — photographer may maintain action to restrain competitor from selling reproductions of plaintiff's original photographs, using plaintiff's name thereon.

See UNFAIR COMPETITION.

PHYSICIANS AND SURGEONS.

Construction and application of section 834 of Code of Civil Procedure — action on life insurance policy — when plaintiff in proofs of death of insured refers to death certificate of a hospital

PHYSICIANS AND SURGEONS — *Continued.*

physician and agrees that it shall be part of the proofs of death, such certificate is admissible in evidence upon the trial and the testimony of the attending physician is not incompetent under section 834.

See EVIDENCE, 2.

PLEADING.

When surety cannot interpose cause of action, existing in favor of his principal, as a defense or counterclaim.

See COUNTERCLAIM.

PLEDGE.

Corporation — When pledge of rental of apartment house, owned by corporation, as security for loan, the proceeds of which were used for the benefit of the corporation, valid. In an action brought by a corporation, owning an apartment house, against its renting agents for a balance of rent in their hands, the defendants proved an agreement by which the rent was to be held as security for a loan made by them, the proceeds of which loan were applied to the payment of interest on a mortgage upon the property of the company. The transactions regarding the loan were conducted by a former president of the company, whose wife was the owner of the majority of the stock and was then president of the corporation, in the presence of and with the tacit approval of the secretary, who was intrusted with the general management of the business of the company. Held, error for the court to hold the agreement of no effect and direct a verdict for the plaintiff. The evidence justified a finding that the loan, though made in form to the former president in person, was for the benefit of the company and the situation was one where property of the company could lawfully be pledged as security, and enough was proved to permit a jury to say that the pledge was within the scope of the secretary's powers. *Barkin Construction Co. v. Goodman.*

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See Interboro Brewing Co. v. Doyle (Mem.), 699.

Sale of stocks carried on margin — when sold without reasonable notice to customer, such sale constitutes a conversion — action by stockbrokers to recover sum claimed to be due from customer — when customer may interpose claim for value of his stocks purchased on margins and sold by parties to whom plaintiff had hypothecated them as collateral.

See STOCKBROKERS.

POLICY (INSURANCE).

When notice of cancellation of fire insurance policy given by insured and received by insurer effective, although insurer took no action with reference thereto until after loss by fire — construction and application of section 122 of Insurance Law relating to cancellation of policies of fire insurance.

See INSURANCE, 2.

PRINCIPAL AND AGENT.

When pledge of rental of apartment house, owned by corporation, as security for loan, the proceeds of which were used for the benefit of the corporation, valid.

See PLEDGE.

PRINCIPAL AND SURETY.

See U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co. (Mem.), 646.

PRINCIPAL AND SURETY — *Continued.*

When surety cannot interpose cause of action, existing in favor of his principal, as a defense or counterclaim.

See COUNTERCLAIM.

PROBATE.

Erroneous probate of will in this state upon theory that it had been admitted to probate in province of Quebec — invalidity of probate of such will because probate in province of Quebec failed to comply with requirements of Code of Civil Procedure and will was not properly authenticated.

See WILL, 1.

PROBATION.

Statutes relating to suspension of sentence and probation construed — revocation of probation and imposition of sentence within two years from date of probation.

See CRIMES, 4, 5.

PROSTITUTION (COMPULSORY).

See People v. Green (Mem.) 669.

PROXIMATE CAUSE.

Master and servant — proximate cause of accident — when master not liable for injury to employee from fall of cases of beer piled in tiers on floor where he was working.

See NEGLIGENCE, 3.

PUBLIC HEALTH LAW.

Practice of medicine without a license — a practitioner who prescribes and uses medicines for which he receives pay, not exempt from procuring a license as one engaged in practicing "the religious tenets" of his church.

See MEDICINE (PRACTICE OF).

QUEENS COUNTY.

Office of county clerk not required to be filled at election in year 1917.

See CONSTITUTIONAL LAW, 9.

QUO WARRANTO.

See People ex rel. Walton v. Hicks (Mem.), 503; People ex rel. Chesner v. Maloney (Mem.), 504.

RAILROADS.

See Luhman v. N. Y., W. & B. Ry. Co. (Mem.), 550.

Person struck by approaching trolley car while crossing a street — duty to look for and see such car when there are no obstructions to the view.

See NEGLIGENCE, 2.

REAL PROPERTY.

See Schermerhorn v. Bedell (Mem.), 536; Kiernan v. Buhlman (Mem.), 554; Haring v. B. H. R. R. Co. (Mem.), 694.

Eminent domain — when act granting lands under water to upland owners invalid because lacking a two-thirds vote — act attempting to ratify and confirm such grants invalid because embracing subjects not expressed in title — when act granting right to fill in lands under

REAL PROPERTY — *Continued.*

water gives an inchoate and vested right of which grantee cannot be deprived without compensation — when part of act giving such rights is valid under Constitution so that part may be upheld although the remainder be rejected as invalid — awards to such upland owners examined and held to be incorrect — basis of award pointed out.

See CONSTITUTIONAL LAW, 1-7.

Action to set aside deed of farm from plaintiff to his nephew, made in consideration of the latter's promise to support and care for plaintiff during life — partial breach of such contract by nephew — duties and obligations of grantee — grantor entitled to lien upon premises.

See CONTRACT, 2.

Proceeding under Real Property Law for sale of trust property by trustee thereof — power of court under the statute to order sale of estates in remainder — when order directing such sale authorized and should be sustained.

See DECEDENT'S ESTATE, 1.

When facts insufficient to show that owner of easement is estopped from maintaining action to restrain obstruction to easement — when right of way in city may be covered if easement is not injured.

See EASEMENTS, 1, 2.

Damages for loss of water from well caused by construction of highway.

See EMINENT DOMAIN, 1.

Covenant for quiet enjoyment will be read into lease — lease of premises including vault under sidewalk — when exclusion of tenant from vault by municipal authorities is partial eviction and constitutes defense in action for rent — inference not permissible that ouster by city was by implication exempted from covenant for quiet enjoyment.

See LANDLORD AND TENANT, 1-3.

Street opening proceedings — assessment — abutting owners who cede land without compensation.

See NEW YORK (CITY OF), 1.

Streets — change of grade — when erection of viaduct in and above a street constitutes a change of grade for which an abutting owner may recover damages.

See NEW YORK (CITY OF), 2.

When inequitable to decree specific performance of contract for purchase of real property.

See VENDOR AND PURCHASER.

Action to restrain alleged trespass upon lands and waters.

See WATER AND WATERCOURSES.

REAL PROPERTY LAW.

Proceeding for sale of trust property — power of court to order sale of estates in remainder.

See DECEDENT'S ESTATE, 1.

REMAINDER.

When equally conditioned upon either death or remarriage of life tenant.

See WILL, 3.

RENT.

Action for rent — lease of premises which included vault under sidewalk — when exclusion of tenant from such vault by municipal authorities is partial eviction of tenant and constitutes defense in action for rent.

See LANDLORD AND TENANT, 1-3.

REPLEVIN.

See Aparicio v. N. E. Equitable Ins. Co. (Mem.), 629.

Gift — action to recover possession of property claimed by plaintiff as a gift from her deceased husband — erroneous dismissal of complaint by Appellate Division — credibility of witnesses question for the jury.

See EVIDENCE.

RIPARIAN RIGHTS.

Eminent domain — when act granting lands under water to upland owners invalid because lacking a two-thirds vote — act attempting to ratify and confirm such grants invalid because embracing subjects not expressed in title — when act granting right to fill in lands under water gives an inchoate and vested right of which grantee cannot be deprived without compensation — when part of act giving such rights is valid under Constitution so that part may be upheld although the remainder be rejected as invalid — awards to such upland owners examined and held to be incorrect — basis of award pointed out.

See CONSTITUTIONAL LAW, 1-7.

Action to restrain alleged trespass upon lands and waters.

See WATER AND WATERCOURSES.

SALE.

1. *Judicial sale — Cannot be attacked upon the ground of a subsequent change in interpretation of law.* A change in the rule of law cannot impair the obligation of a contract. Where a judicial sale of land was made in accordance with the directions and requirement of an order of the court, the law as then declared entered into the contract of sale and conveyance, and the sale is valid and will not be interfered with. *Morris v. Henry.* 96

2. *What constitutes a purchaser's acceptance of goods shipped to him in pursuance of a contract of sale — What purchaser must do to reject goods if they do not conform to the contract — When question of acceptance by purchaser one of fact to be determined by a jury.* Whether a purchaser's retention, sale or disposition of property constitutes an acceptance must be determined, as a general rule, as a question of fact. If the article purchased is not in accordance with the contract, then the purchaser must, upon discovering that fact, do nothing inconsistent with the vendor's ownership. Mere complaint by the vendee that the goods do not come up to the contract does not amount to a rejection. If the goods received do not conform to the contract, as to quality or kind, the purchaser must, as a general rule, within a reasonable time after such facts have been ascertained, return or offer to return them. In case the goods are in such condition that they must be speedily disposed of or else there will be a total loss,

SALE — Continued.

then there is an exception which permits the purchaser to dispose of them, but this exception only applies when the seller cannot be communicated with and instructions from him quickly obtained. Defendants purchased from plaintiff's assignor a carload of turkeys to be, as found by the jury, "dry picked." When the car arrived it was discovered that the turkeys had been "scalded" instead of "dry picked" and that they were in bad condition. Defendants at once wired plaintiff's assignor stating these facts and asked instructions. Later they again wired "Have turned car over to house that can sell such stuff." Neither telegram was answered by plaintiff's assignor although both were received by it. Defendants also wrote the vendor saying in substance that in the event of any deficiency in the sale, they would expect the vendor to make good. Held, that it was error for the trial court to charge that there was no evidence upon which the jury could find that the defendants accepted the turkeys, and also erred in instructing the jury that they must find a verdict for the defendants if the contract was for dry picked turkeys, since such instruction also withdrew from the jury the question of an acceptance. *White v. Schweitzer.* 461

See Benz Auto Import Co. v. Froehlich (Mem.), 537; *Roscoe Co. v. Lindner* (Mem.), 553.

Delivery of goods — refusal of purchaser to accept goods until delivered at factory of purchaser and inspection thereat — vendor cannot maintain action for purchaser's breach of contract of sale when tender is accompanied by a condition.

See CONTRACT, 1.

Power of court to order sale of estates in remainder — when order directing such sale authorized.

See DECEDEDENT'S ESTATE, 1.

Loss of goods shipped by express — failure of vendor to state value of goods — when vendor cannot compel buyer to pay for goods shipped to take place of goods lost.

See VENDOR AND VENDEE.

SALE (CONDITIONAL).

See Crocker-Wheeler Co. v. Genesee Recreation Co. (Mem.), 565.

SCAFFOLDS.

Master and servant — injury to plaintiff by fall of platform or scaffold — facts examined and held that structure which fell was a scaffold.

See NEGLIGENCE, 4.

SERVICE.

See Agminas v. Wilkes-Barre Colliery Co. (Mem.), 604.

SERVICES.

Action for wrongful discharge — when facts do not justify discharge — bad motive or ignorance of adequate reason immaterial.

See MASTER AND SERVANT, 1.

SESSION LAWS.

1885, Ch. 502 — Erie county clerk — compensation restricted to statutory salary.

See COUNTIES, 2.

SESSION LAWS — *Continued.*

1891, Ch. 149 — Erie county clerk — compensation restricted to statutory salary.

See COUNTIES, 2.

1895, Ch. 785 — Charter of village of Bath — treasurer's bond.

See SURETY BONDS.

1901, Ch. 466 — New York city charter — summary dismissal of deputy tax commissioner improper.

See CIVIL SERVICE, 2.

Idem — New York city charter — street opening proceedings.

See NEW YORK (CITY OF), 1.

1909, Ch. 12 — Business Corporations Law — corporation prohibited from practicing law.

See TAX, 2.

1909, Ch. 15 — Civil Service Law — summary dismissal of deputy tax commissioner of New York city improper.

See CIVIL SERVICE, 2.

1909, Ch. 16 — County Law — costs and expenses of proceedings for removal of county officer.

See APPEAL, 8.

Idem — County Law — constitutionality of provision for repayment of costs and expenses of proceedings for removal of county officer.

See COUNTIES, 1.

1909, Ch. 18 — Decedent Estate Law — establishment of will probated in foreign country.

See WILL, 1.

1909, Ch. 22 — Election Law — section 122 constitutional.

See CONSTITUTIONAL LAW, 10.

1909, Ch. 25 — General Business Law — agreement by corporation to pay interest in excess of legal rate not usurious.

See INTEREST.

1909, Ch. 33 — Insurance Law — construction and application of section 122 relating to cancellation of policies of fire insurance.

See INSURANCE, 2.

1909, Ch. 38 — Lien Law — requirement that assignment of moneys due on a contract shall be filed in proper county clerk's office.

See LIENS, 1.

Idem — Extent to which landlord is liable upon mechanic's lien for work done in compliance with agreement by him to contribute to improvements made by tenant.

See LIENS, 2.

1909, Ch. 49 — Public Health Law — practice of medicine without a license.

See MEDICINE (PRACTICE OF).

SESSION LAWS — *Continued.*

1909, Ch. 52 — Real Property Law — proceeding for sale of trust property — power of court to order sale of estates in remainder.

See DECEASED'S ESTATE, 1.

1910, Ch. 503 — Liquor Tax Law — transfer of certificate.

See LIQUOR TAX.

1910, Ch. 548 — New York city charter — street opening proceedings.

See NEW YORK (CITY OF), 1.

1911, Ch. 298 — Liquor Tax Law — transfer of certificate.

See LIQUOR TAX.

1911, Ch. 571 — Personal Property Law — sales of goods.

See CONTRACT, 1.

Idem — Personal Property Law — when vendor cannot compel buyer to pay for goods shipped to take place of goods previously shipped but lost.

See VENDOR AND VENDEE.

1911, Ch. 647 — Conservation Law — selling of game out of season.

See FISH AND GAME.

1914, Ch. 41 — Workmen's Compensation Law — when cause of action for negligence not barred.

See NEGLIGENCE, 1.

Idem — Workmen's Compensation Law — death of night watchman employed by corporation engaged in hazardous occupation — when widow of deceased watchman entitled to compensation, although there is no evidence showing how death of watchman was caused.

See WORKMEN'S COMPENSATION, 1.

Idem — Workmen's Compensation Law — superintendent of apartment house injured by fall from stepladder while making ordinary repairs not entitled to compensation.

See WORKMEN'S COMPENSATION, 2.

Idem — Workmen's Compensation Law — president and principal executive officer of corporation not entitled to compensation for injury.

See WORKMEN'S COMPENSATION, 3.

Idem — Workmen's Compensation Law — industrial commission must pass upon nature of employment of injured employee if it is contended and shown by any evidence that he was employed in interstate, instead of intrastate, commerce.

See WORKMEN'S COMPENSATION, 4.

Idem — Workman having a general and special employer — when person injured may look to either or both for compensation.

See WORKMEN'S COMPENSATION, 5.

Idem — Workmen's Compensation Law — jurisdiction of state industrial commission to determine whether employers' liability policy

SESSION LAWS — *Continued.*

has been duly canceled by insurance company before an accident to an employee.

See WORKMEN'S COMPENSATION, 6.

Idem — Workmen's Compensation Law — when superintendent of apartment house not entitled to compensation for injuries caused by fall of a radiator which he was moving.

See WORKMEN'S COMPENSATION, 7.

1915, Ch. 284 — Statute abolishing office of coroner not in conflict with State Constitution.

See CONSTITUTIONAL LAW, 8.

1915, Ch. 497 — Highway Law — right to grant costs to non-resident owner of land condemned.

See EMINENT DOMAIN, 2.

1915, Ch. 664 — Tax Law — transfer tax upon personal property owned by husband and wife as joint tenants.

See TAX.

1916, Ch. 622 — Workmen's Compensation Law — meaning and application of term employee in section 3 of law as amended.

See WORKMEN'S COMPENSATION, 8.

1917, Ch. 290 — Provision authorizing appeal to Court of Appeals when constitutional question is involved.

See APPEAL, 7.

SETTLEMENT OF ACTION.

See Gross v. Erie R. R. Co. (Mem.), 653.

SPECIFIC PERFORMANCE.

See Van Der Bent v. Gilling (Mem.), 528; Adami v. Gercken (Mem.), 556; Gabel v. Hastings Home Co. (Mem.), 578; Garibaldi R. & C. Co. v. Santangelo (Mem.), 673.

When inequitable to decree specific performance of contract for purchase of real property.

See VENDOR AND PURCHASER.

STATE.

1. *Court of Claims — Jurisdiction — Notice of intention to file claim must be given pursuant to statute (Code Civ. Pro. § 264).* The Court of Claims has no jurisdiction to hear and determine a claim against the state, where no notice in writing of intention to file a claim has been filed, as required by section 264 of the Code of Civil Procedure. The question being one of jurisdiction, it can be raised at any time and cannot be waived by any officer or authority representing the state. *Buckles v. State of N. Y.* 418

2. *Filing of claim not equivalent to filing of notice of intention to file claim.* The filing of a claim against the state is not equivalent to the filing of the written notice of intention to file a claim provided for by section 264 of the Code of Civil Procedure. *Butterfield v. State of N. Y.* 701

In proceeding to acquire compensation for lands under water appropriated by state for canal purposes, state may interpose defense that acts granting rights are unconstitutional.

See CONSTITUTIONAL LAW, 5.

STATUTES.

1. *Part of a statute should not be construed by itself, but in connection with the context, and, if practicable, with the origin and purpose of the statute.* A clause in a statute ought not to be interpreted by itself wholly detached from the statute of which it is a portion. The origin and purpose of the entire statute should be considered, and especially, if they are known and open to consideration, the origin and purpose of the particular provision which is to be construed. *Edison Electric Ill. Co. v. Frick.* 1

2. *Interpretation of statutes.* The intention of the lawgiver is to be sought first in the words of a statute, and, if they are obscure, in the occasion of the enactment and in the policy which dictated it, when that can legitimately be ascertained. *Matter of Bowne v. Bowne Co.* 28

3. *Changes in arrangement or division of sections will not work change of meaning.* Changes in arrangement or in the division of sections of a statute will not work a change of meaning unless the intent to change is manifest. That principle applies with special force to consolidating statutes. *Fifth Ave. Bldg. Co. v. Kernochan.* 370

New York statutes construed or referred to.

See CODE OF CIVIL PROCEDURE.

See CODE OF CRIMINAL PROCEDURE.

See PENAL LAW.

See SESSION LAWS.

STOCKBROKERS.

Sale of stocks carried on margin—When sold without reasonable notice to customer, such sale constitutes a conversion—Action by stockbrokers to recover sum claimed to be due from customer—When customer may interpose claim for value of his stocks purchased on margins and sold by parties to whom plaintiff had hypothecated them as collateral. A broker intending to sell stocks carried on margin for a customer must give reasonable notice of the time and place of such sale if he would avoid the charge of conversion. A person whose stocks have been converted is entitled to a reasonable time after notice of the conversion within which to determine whether he will purchase other stocks in the place thereof and he may use as a basis for his claim of damages resulting from the conversion the highest prices which have prevailed during such reasonable period. In an action by plaintiffs, who were stockbrokers, to recover a sum claimed to be due them from defendant on the purchase of stocks held by them as collateral, which stocks were sold without notice to defendant by the parties with whom plaintiffs had hypothecated them, defendant sought to establish a counterclaim on the ground that the sale amounted to a conversion and that before he learned of this conversion, about a year later, the value of the stocks had so increased as to create a balance in his favor over and above the amount due thereon. The court dismissed his counterclaim as matter of law, and the plaintiffs attempt to sustain this dismissal by the claim that defendant knew of the conversion at about the time it occurred, and that the value of his stocks then was so low as not to establish any counterclaim which would diminish plaintiffs' recovery as now allowed. Held, that while a jury might find facts charging defendant with knowledge of the conversion at about the time it occurred, and when prices of his stocks were too low to establish a claim which would diminish plaintiffs' recovery, this knowledge could not be imputed as matter of law and that, therefore, it was error to dismiss his counterclaim. *Mayer v. Monzo.* 442

See Ayers v. Williston (Mem.), 563.

STOCKS AND STOCKHOLDERS.

See Matter of Bronson (Mem.), 661; *Fisk v. Batterson* (Mem.), 693.

Sale of stocks carried on margin — when sold without reasonable notice to customer, such sale constitutes a conversion — action by stockbrokers to recover sum claimed to be due from customer — when customer may interpose claim for value of his stocks purchased on margins and sold by parties to whom plaintiff had hypothecated them as collateral.

See STOCKBROKERS.

Gift of stock held by testator in manufacturing corporation — provisions of will examined and held that it was the intention of testator to give to the legatees named the specific shares of stock held by him in the manufacturing corporation named; that such legacies were not general, and that the dividends accrued on such stock should be paid to the specific legatees.

See WILL, 2.

STREET OPENING.

See Matter of City of New York (Mem.), 595.

Street opening proceedings — provisions of charter that abutting owners who cede lands from front of lot to center of street without compensation shall not be chargeable with any expense of opening the street except their proportion of damages for buildings taken or injured by the changes made in opening the street.

See NEW YORK (CITY OF), 1.

STREETS.

Not intent of legislature to extend right to fill in lands over space included within lines of streets.

See CONSTITUTIONAL LAW, 7.

Person struck by approaching trolley car while crossing a street — duty to look for and see such car when there are no obstructions to the view.

See NEGLIGENCE, 2.

Street opening — when owner ceding land may be assessed.

See NEW YORK (CITY OF), 1.

Change of grade — when erection of viaduct in and above a street constitutes a change of grade for which an abutting owner may recover damages.

See NEW YORK (CITY OF), 2.

STREET WIDENING.

See Matter of City of New York (Mem.), 596, 597.

SUBROGATION.

Right thereto does not accrue until whole debt has been discharged by person seeking to be subrogated. The equity of subrogation does not arise until the whole debt has been discharged. Hence a creditor may not be required to surrender any part of his collateral till payment has been made in full. The trust company, defendant, agreed to use certain funds received by it from plaintiff's assignor for the purchase of stocks which it was to hold in trust as collateral to a loan made by such assignor to the makers of the notes. The trust company did not buy the stocks and is now insolvent. The makers of the notes have paid plaintiff part of the amount due thereon. This action has been brought to determine the indebtedness on

SUBROGATION — *Continued.*

which the plaintiff's dividend must be computed in the distribution of the defendant's assets. *Held*, that the defendant has no concern with the payments made by the makers of the notes, and hence the plaintiff is entitled to have the dividends computed on the whole amount of the trust deposit held by defendant. *McGrath v. Carnegie Trust Co.* 92

SURETY BONDS.

Bonds given by official having custody of village funds — Liability upon general bond not affected by fact that another bond was given for the specific fund for the loss of which recovery is sought. Where the legislature requires an officer to perform a special duty and to give a special bond for the performance of that duty, no liability may attach to the general bondsmen in the absence of a declaration that they shall be liable. But that rule does not apply where a fund is placed in the hands of a treasurer for safe keeping and disbursement without any direction that a special bond be executed for the security of that fund. To relieve them there must be some intention expressed by the legislature to that effect. The trustees of a village fixed the amount for which its treasurer should give bonds. He gave two separate bonds making up that amount. The bond upon which this suit was brought is in the precise language required by the charter of the village (L. 1895, ch. 785, tit. 2, § 11) and by a resolution adopted by its board of trustees. It purports to insure the village against any loss because of the default of its treasurer and it should be enforced in the terms in which it was written. The liability thereon is not affected by the fact that the treasurer gave another bond for the specific fund, for the loss of which recovery is sought in this action. *Village of Bath v. McBride.* 231

See *S. G. Ins. Co. v. Dolan* (Mem.), 712.

TAX.

1. *Transfer tax — Personal property owned by husband and wife as joint tenants — Upon death of husband his undivided half interest therein passes to his wife and is subject to a transfer tax as if it had been bequeathed by will — The undivided half interest of the wife not taxable.* There is a joint ownership of personal property analogous to an estate in lands, but husband and wife do not take personal property as tenants by the entirety. Where a husband and wife owned jointly certain securities which they delivered to a trust company to hold as custodian, pay them the income in equal shares, and, if the agreement should be in force at the death of either, to deliver and pay over the securities and any income thereon then on hand to the survivor, they owned the securities as joint tenants but not by the entirety. Subsequent to the deposit of such securities and before the husband's death section 2204 of the Tax Law was amended (L. 1915, ch. 664) by providing that whenever intangible property is held in the joint names of two or more persons as joint tenants and payable to either or to the survivor upon the death of one of such persons, the right of the survivor to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant and had been bequeathed to the survivor by will. For the purposes of taxation the wife is deemed to have acquired the husband's interest in the joint property by his death and is taxable under this statute. As to the one-half the wife owned, she gained nothing by the death of the husband except the elimination of his interest and such one-half is not taxable. *Matter of Mc Kelway.* 15

TAX — *Continued.*

2. When certiorari to review assessment obtained for taxpayer by a corporation should not be dismissed on ground that the corporation was prohibited from practicing law. Where a taxpayer acting in good faith employed a corporation to take the necessary steps to have an assessment against him corrected and the corporation employed an attorney who obtained a writ of certiorari to review the assessment, the writ should not be dismissed upon the ground that the corporation was prohibited from practicing law by the statutes (Business Corp. Law, § 2-a; Cons. Laws, ch. 4, and Penal Law, § 280), the taxpayer having thereafter ratified the employment of and formally retained the attorney in the matter. *People ex rel. Floersheimer v. Purdy.* 481

See People ex rel. Floersheimer v. Purdy (Mem.), 483; *People ex rel. Broadway Park Place Co. v. Purdy* (Mem.), 488; *People ex rel. N. Y., W. & B. Ry. Co. v. Purdy* (Mem.), 584; *City of New York v. Beers* (Mem.), 627; *County of Erie v. Town of Tonawanda* (Mem.), 656.

TAX LAW.

Transfer tax upon personal property owned by husband and wife as joint tenants.

See TAX, 1.

See Tax Lien Co. v. Bird (Mem.), 521.

TENDER.

Sale — delivery of goods — refusal of purchaser to accept goods until delivered at factory of purchaser and inspection thereat — vendor cannot maintain action for purchaser's breach of contract of sale when tender is accompanied by a condition.

See CONTRACT, 1.

TITLE.

See Northern Bank v. Washington Savings Bank (Mem.), 505; *Weeks v. Dominy* (Mem.), 512; *Kluepfel v. Weaver* (Mem.), 529; *Carpenter v. N. Y. Trust Co.* (Mem.), 719.

TRADE.

Unfair competition in trade — photographer may maintain action to restrain competitor from selling reproductions of plaintiff's original photographs, using plaintiff's name thereon.

See UNFAIR COMPETITION.

TRANSFER TAX.

See Matter of Steinwender (Mem.), 611; *Matter of Cory* (Mem.), 612; *Matter of Hawes* (Mem.), 613.

Personal property owned by husband and wife as joint tenants — upon death of husband his undivided half interest therein passes to his wife and is subject to a transfer tax as if it had been bequeathed by will — the undivided half interest of the wife not taxable.

See TAX.

TRESPASS.

Action to restrain alleged trespass upon lands and waters.

See WATER AND WATERCOURSES.

TRIAL.

1. When verdict may be directed or complaint dismissed. If, in the discretion of the court, a verdict may be set aside, the parties are not thereby deprived of a jury trial. It is only when a verdict for

TRIAL — *Continued.*

the plaintiff *must* be set aside as unsupported by sufficient evidence that a verdict for the defendant should be directed or the complaint dismissed. *Getty v. Williams Silver Co.* 34

2. Motion to dismiss complaint for failure to state a cause of action — When sufficiently definite, without pointing out the particular defect relied on. Where in an action to recover upon a policy of insurance on an automobile upon the ground that it was stolen, and while being illegally used by the person taking it was destroyed, it appeared both from the complaint and the evidence that the alleged loss occurred before the policy became effective, and hence that the complaint failed to state a cause of action and the proof followed the pleading, the objection was not waived by failure to raise it more definitely than by a general motion to dismiss on the ground that the complaint does not state and the evidence does not establish a cause of action. The motion to dismiss the complaint upon the ground that it failed to state a cause of action was not based upon a mere technicality, but addressed itself to the merits. Defendant's motion to dismiss, although general in form, not pointing out the particular defect, was proper. It was not like a general objection to evidence or a general motion for a nonsuit behind which something correctible may be hidden. *Troy Automobile Exchange v. Home Ins. Co.* 58

Conflict of statements on direct and cross-examination for jury to determine.

See APPEAL, 5.

Murder — evidence of identification of defendant as person who committed the crime — erroneous evidence of former identification — motive for crime — erroneous charge by court that motive should not be considered by jury.

See CRIMES, 1-3.

Credibility of witnesses question for jury.

See EVIDENCE, 1.

Witness — construction and application of section 834 of Code of Civil Procedure — action on life insurance policy — when plaintiff in proofs of death of insured refers to death certificate of a hospital physician and agrees that it shall be part of the proofs of death, such certificate is admissible in evidence upon the trial and the testimony of the attending physician is not incompetent under section 834.

See EVIDENCE, 2.

TRUST.

See Court v. Bankers' Trust Co. (Mem.), 608; *Campion v. R. C. Orphan Asylum* (Mem.), 725.

Real property — proceeding under Real Property Law (Cons. Laws, ch. 50, §§ 105, 107) for sale of trust property by trustee thereof — power of court under the statute to order sale of estates in remainder — when order directing such sale authorized and should be sustained.

See DECEASED'S ESTATE, 1.

Trust estate for benefit of testator's daughter and her children — will construed and held that, the daughter and children being dead, the remainder had vested in the children and passed to their father.

See WILL, 4.

TRUST — *Continued.*

Testamentary trusts — an ulterior limitation, although invalid, will not be allowed to invalidate the primary provision, but will be cut off if the trust is not an entirety — provisions of will creating a trust construed.

See WILL, 5.

UNFAIR COMPETITION.

Unfair competition in trade — *Photographer may maintain action to restrain competitor from selling reproductions of plaintiff's original photographs, using plaintiff's name thereon.* Unfair competition in trade or business may result from representations or conduct which deceive the public into believing that the business name, reputation or good will of one person is that of another. An action to restrain unfair competition may be maintained by a photographer to restrain the sale by a competitor of reproductions of plaintiff's original photographs of stage scenes and characters representing them to be the originals made by the plaintiff, using the plaintiff's trade name thereon. *White Studio v. Dreyfoos.* 46

USURY.

See Shopiro v. Berlin (Mem.), 567; *London Finance Co. v. Shattuck* (Mem.), 702.

In absence of an interdicting statute parties may agree that a rate of interest, exceeding the legal rate, shall be paid — agreement to pay interest at a certain rate before a loan is due and a greater rate thereafter is an agreement to pay interest not a penalty — agreement by a corporation to pay interest in excess of the legal rate is not usurious, and the guarantor of such contract is liable thereon.

See INTEREST.

VENDOR AND PURCHASER.

When inequitable to decree specific performance of contract for purchase of real property. Where, in an action to compel specific performance of a contract to purchase real property it appears that the contract was understood by the contracting parties to be wholly dependent upon the defendant obtaining title to plaintiff's and other real property mentioned therein, the title to all of which was to be taken solely for a purpose which has either been prevented by a city ordinance or can only be carried out after successfully maintaining in the courts that such ordinance is unconstitutional, it would be inequitable to decree specific performance. *Anderson v. Steinway & Sons.* 639

See Brody, Adler & Koch Co. v. Hochstadter (Mem.), 513; *Bishop v. Decker* (Mem.), 557.

VENDOR AND VENDEE.

Sale — Loss of goods shipped by express — Failure of vendor to state value of goods — When vendor cannot compel buyer to pay for goods shipped to take place of goods lost. Where a vendor shipped by express to the buyer goods of the value of more than fifty dollars, which were paid for in advance, without declaring their value, thus relieving the express company from liability for more than that amount and the goods were lost in transit and a duplicate shipment was made to the buyer, the latter cannot be compelled to pay again. The general rule is that delivery to a carrier is delivery to the buyer, but the rule has its exceptions, one of which is applicable to this case. The seller must not sacrifice the buyer's right to claim indemnity from

VENDOR AND VENDEE — *Continued.*
the carrier. (Personal Property Law, § 127; Cons. Laws, ch. 41, amd. L. 1911, ch. 571.) *Miller v. Harvey.* 54

Sale — delivery of goods — refusal of purchaser to accept goods until delivered at factory of purchaser and inspection thereat — vendor cannot maintain action for purchaser's breach of contract of sale when tender is accompanied by a condition.

See CONTRACT, 1.

What constitutes a purchaser's acceptance of goods shipped to him in pursuance of a contract of sale — what purchaser must do to reject goods if they do not conform to the contract — when question of acceptance by purchaser one of fact to be determined by a jury.

See SALE, 2.

VENUE.

See Lawton v. Farrell (Mem.), 654.

VERDICT.

Setting aside verdict — when verdict for defendant should be directed or complaint dismissed.

See TRIAL, 1.

VILLAGES.

Public officers — bonds given by official having custody of village funds — liability upon general bond not affected by fact that another bond was given for the specific fund for the loss of which recovery is sought.

See SURETY BONDS.

WATER AND WATERCOURSES.

Action to restrain alleged trespass upon lands and waters — Record examined and held that action cannot be maintained. Plaintiff, a manufacturing corporation, part of whose dam across a stream was on property of the state, without authority or permission therefrom, entered into an agreement with defendant, a contractor engaged in the improvement of a section of the barge canal for the state, whereby plaintiff in consideration that it should be furnished with motive power during the construction by defendant of a new dam for the state at another point consented to the destruction of the old dam previously erected by plaintiff. The old dam was destroyed and during the construction of the new dam the power furnished by defendant to plaintiff was greater than that plaintiff could have obtained from the old dam. The defendant under a contract with the state constructed a new dam, with more water head than the removed dam was capable of producing, and with a much larger storage capacity, which plaintiff has since continuously used. Plaintiff brought this action against the defendant to restrain trespass and a threatened trespass upon its lands and waters. Held, that upon the facts found by the trial court the action cannot be maintained. *Whitehall Water Power Co. v. Atlantic, Gulf & Pacific Co.* 42

Damages for loss of water from well caused by construction of highway.

See EMINENT DOMAIN, 1.

WAY.

When right of way in city may be covered.

See EASEMENTS, 2.

WILL.

1. *Erroneous probate of will in this state upon theory that it had been admitted to probate in province of Quebec — Invalidity of probate of such will because probate in province of Quebec failed to comply with requirements of Code of Civil Procedure and will was not properly authenticated.* Decedent died in the province of Quebec, leaving a paper purporting to be her will. On petition to the surrogate of New York county the paper was admitted to probate and ancillary letters issued thereon upon the theory that it had been admitted to probate in Quebec. Section 2695 of the Code of Civil Procedure as in force at that time, and sections 23 and 45 of the Decedent Estate Law (Cons. Laws, chap. 13) provided a complete scheme for establishing within the state wills duly probated in other countries. The surrogate, however, had no jurisdiction unless there was proof before him of the statutory requirements as to the probate in Quebec and unless the petition asking for the letters was accompanied by a copy of the will and the foreign letters, if any had been issued, authenticated as prescribed by the Decedent Estate Law. On examination of the record, it appears that there was a failure to comply with these provisions; that there was no probate of the will in Quebec within the meaning of our Code, and that the will was not properly authenticated. Hence, the surrogate should entertain a petition by the next of kin in proper form asking probate, and also an application by one of the next of kin to revoke the ancillary letters on the ground of want of jurisdiction, even though such next of kin was not entitled to notice of the original application therefor. *Matter of Connell.* 190

2. *Gift of stock held by testator in manufacturing corporation — Provisions of will examined and held that it was the intention of testator to give to the legatees named the specific shares of stock held by him in the manufacturing corporation named; that such legacies were not general, and that the dividends accrued on such stock should be paid to the specific legatees.* Testator bequeathed all of the shares held by him of the capital stock of the Kee Lox Manufacturing Company, in various amounts, to relatives and employees. Within the year after the granting of letters testamentary the dividends payable upon this stock amounted to a very considerable sum which, if the legacies be general, pass under the residuary clause of the will, but if specific follow the stock into the hands of the specific legatees. The testator, who was the organizer and incorporator of the corporation, owning nearly one-half of its stock, bequeathed the total amount of his holdings to his relatives and employees, directing that the executor pay all expenses out of other partitions of his estate; that the executor open his deposit box in which he kept the stock, in the presence of three of the beneficiaries thereof, and that his debts be paid out of the proceeds of the stocks and bonds which he "may hold in corporations other than the Kee Lox Manufacturing Company." On examination of the terms of the will, and applying the rule that it is the intention of a testator, as gathered from his entire will, which determines whether a legacy be general or specific, held, that there clearly is an intention to give to the legatees named the specific stock which the testator held in the Kee Lox Manufacturing Company at the date of his will and at the time of his death. *Matter of Security Trust Co.* 213

3. *Provisions of will, giving to testator's wife a life estate with remainder over if she remarries, construed and held that the gifts of remainder are equally conditioned upon either the death or remarriage of the widow.* It is not an unreasonable construction of a will that where a testator gives to his wife a life estate with remainder over if she remarries, he has in mind the ending of the life estate by death as well. Unless the

WILL — Continued.

will indicates that the testator intended otherwise, such a rule would ordinarily give effect to his meaning. The will of the testator by its first clause gave the income of all of his estate to his wife "while she remains my widow, should she remarry I want my estate to be divided as follows, as written & mentioned on page 2 of this will." On page 2 various bequests are made to his daughter, nephew, brother-in-law and son, without limitation. *Held*, that the gifts to the daughter, the nephew, the brother-in-law and the son are all equally conditioned upon either the death or remarriage of the widow. *Matter of Schriever.*

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4. Trust estate for benefit of testator's daughter and her children — Will construed and held that, the daughter and children being dead, the remainder had vested in the children and passed to their father. Testator devised his real estate to his executors as trustees to receive the rents and income thereof and, after payment of taxes and expenses, to pay to his widow, annually, one-third of such income, and to divide the remaining two-thirds thereof equally among his daughter and two sons. By a subsequent clause testator directed that after the death of his wife, the net income of the one-third part of his real estate, which had been paid her, should be paid to his daughter during her lifetime and that upon her death, if she left issue her surviving, such third part of the principal should be paid over to her issue, when such issue attained the age of twenty-one years, and until such issue should become twenty-one years of age the net income of said one-third part of his real estate should be used for their maintenance and education. Testator further provided that "Should, however, my daughter die without leaving lawful issue her surviving, or should all of such issue, if any, die before attaining the age of twenty-one years, then, the said one-third part of my real estate, also the share of the income of my real estate directed to be paid to my daughter during the lifetime of my wife, shall be paid over and divided equally, share and share alike, among her then surviving brothers," and if either brother was then dead, among his issue. Testator's wife is still living, but his daughter died about nine years after his death, leaving three children, all of whom reached the age of twenty-one years and all of whom have since died leaving their father as their sole surviving heir at law and next of kin. *Held*, upon examination and construction of testator's will, that when the daughter's children attained the age of twenty-one years, survivorship ceased to be a condition, their remainders became vested and their estates passed to their heirs, and, hence, the issue of testator's sons cannot take under the will, and the husband of testator's daughter, as the only surviving heir at law and next of kin of her children, has succeeded to their rights and is now the person presumptively entitled to the next eventual estate, and, therefore, that the income thereof goes to him. *Matter of Ossman v. Van Roemer.*

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5. Testamentary trusts — An ulterior limitation, although invalid, will not be allowed to invalidate the primary provision, but will be cut off if the trust is not an entirety — Provisions of will creating a trust construed. An ulterior limitation in a will creating a trust, though invalid, will not be allowed to invalidate the primary disposition of the will, but will be cut off in the case of a trust which is not an entirety. Testator bequeathed \$15,000 to his trustee to apply the income thereof to the use of his three grandchildren during their minority and directed the trustee to pay over to said grandchildren, as each arrived at the age of twenty-one years, the equal one-third part of said trust fund to be theirs absolutely, and in the event of the death of any of his grandchildren, before attaining the age of twenty-one

WILL — Continued.

years, with issue, he bequeathed the share, to which the deceased grandchild would have been entitled at majority, to the issue of such grandchild. That in the event of the death of any grandchild before reaching majority without issue, the trustee should apply the income of the share of the deceased grandchild to the use of the survivor or survivors of his grandchildren until they should attain majority when the trust fund should be disposed of in whole or equal shares as the case might be in accordance with the previous provisions. *Held*, that the last mentioned provision is in violation of the statute (Personal Property Law, § 11, Cons. Laws, chap. 41) as rendering it possible to suspend the power of alienation for longer than two lives in being. *Held, further*, that said illegal provision can, and should, be eliminated from the will so that there remains for each of the grandchildren a trust fund of \$5,000, to be disposed of as in the third clause provided, and upon the death of any beneficiary before twenty-one leaving issue, the principal sum goes to his issue absolutely, and should the beneficiary die under twenty-one without issue, the trust ends and the principal sum falls into the residuary estate. *Matter of Colegrove.* 455

See Matter of Caffery (Mem.), 486; *Matter of Farmers' Loan & Trust Co.* (Mem.), 620; *Matter of Brewster* (Mem.), 657.

Legal community under the law of France — establishment — domicile — election and estoppel applicable to property rights governed by French Code — when widow estopped from claiming legal community in her husband's estate.

See DECEDENT'S ESTATE, 2-4.

WORKMEN'S COMPENSATION.

1. *Death of night watchman employed by corporation engaged in hazardous occupation — When widow of deceased watchman entitled to compensation although there is no evidence showing how death of watchman was caused.* A night watchman employed by a corporation engaged in a business designated as "hazardous" under the Workmen's Compensation Law (Cons. Laws, ch. 67, § 2, group 34) to patrol its buildings at night, is within the law, and where the body of such watchman, who had begun his duties for the night, was found, about midnight, at the bottom of the well under the staircase in one of the buildings, his widow is entitled to compensation and the award of the state industrial commission should be sustained. Under the provisions of the Compensation Law (§§ 21, 68), relating to rules of evidence and presumptions, and the liberal construction which has been placed thereon by this court for the purposes of carrying into effect the intention of the legislature, there was evidence in the record presented to the commission sufficient to justify the findings made by the commission. *Matter of Fogarty v. Nat. Biscuit Co.* 20

2. *Superintendent of apartment house injured by fall from stepladder while making ordinary repairs not entitled to compensation.* The claimant was employed as a superintendent of an apartment house and incidental to that employment he made ordinary repairs on such building. While mounted on a stepladder engaged in cutting away a part of a door to prevent "binding" he fell and broke his arm. *Held*, that he was not engaged in a hazardous employment carried on by his employer for pecuniary gain, within the meaning of the Workmen's Compensation Law, at the time he was injured, and that the work that he was engaged in at the time of the accident was neither "structural carpentry" or "construction, repair and demolition of buildings," as enumerated in group 42 of section 2 thereof. (Cons. Laws, ch. 67.) *Matter of Schmidt v. Berger.* 26

WORKMEN'S COMPENSATION — Continued.

3. The president and principal executive officer of a corporation, engaged in a hazardous occupation, not an "employee" entitled, under the statute, to compensation for injuries received while assisting other employees in performing manual labor. The words of section 3 of the Workmen's Compensation Law (Cons. Laws, ch. 67) defining "employer" and "employee" are not clear, but, construed in the light of the legislative purpose, they do not justify the conclusion that the distinction between the higher executive officers of a corporation and its workmen was obliterated. A workman in a broad sense is one who works in any department of physical or mental labor, but in common speech is one who is employed in manual labor, such as an artificer, mechanic or artisan, while an employee in a broad sense is one who receives salary or wages or other compensation from another, but in common speech is usually applied to clerks, laborers, etc., and not to the higher officers of a corporation. The president and principal executive officer of a corporation which employs workmen in carrying on a hazardous occupation is not entitled as such to the benefits of the Workmen's Compensation Law as an employee if he meets with an accident. *Matter of Bowne v. Bowne Co.* 28

4. Industrial commission must pass upon nature of employment of injured employee if it is contended and shown by any evidence that he was employed in interstate, instead of intrastate, commerce. In view of the restrictions placed by the United States Supreme Court upon the application of the Workmen's Compensation Law (L. 1914, ch. 41), to the effect that compensation cannot be awarded under that act for injuries received in the course of interstate commerce, it is necessary that the commission should pass upon the nature of the employment of an injured employee, where, as in this case, the contention is seriously made and supported by evidence that the employment at the time of the injury was in the course of intrastate commerce. *Matter of Saxon v. Erie R. R. Co.* 179

5. Master and servant — Workman having a general and special employer — When person injured may look to either or both for compensation. The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself, and he may, so far as its provisions are applicable, look to one or to the other or to both for compensation for injuries due to occupational hazards (Workmen's Compensation Law, § 3, subds. 3, 4), and the industrial commission may make such an award as the facts in the particular case may justify. Claimant's intestate was driver of a truck owned by the defendant company, for the operation of which the employer of the decedent furnished a horse and driver, and his death was caused by the explosion of a can of gasoline which he was delivering in the course of his duty. An award was properly made against the general employer. *Matter of De Noyer v. Cavanaugh.* 273

6. Insurance — Cancellation of policy covering liability of an employer for accidents to his employees — Jurisdiction of state industrial commission to determine whether employers' liability policy has been duly canceled by insurance company before an accident to an employee — Erroneous decision by commission that notice of cancellation was ineffectual because name and post office of insured were misspelled. Under the Workmen's Compensation Law (Cons. Laws, ch. 67, §§ 20, 23, 54, subds. 1, 2) the state industrial commission has power to determine whether a policy of insurance covering the liability of an employer had been canceled prior to the time an accident occurred, or whether it was in force, and if so, the liability of the insurance company under it.

WORKMEN'S COMPENSATION — *Continued.*

An insurance company issued a policy insuring an employer against accidents to his employees for a year. In the policy the insured's address was given as Philip Vanocour, Granitville, Port Richmond, Richmond county, N. Y., and his place of business 17 Vedder avenue, Port Richmond, New York. Six months later, no part of the premium having been paid, the insurance company notified the insured that it had elected to cancel the policy, such cancellation to take effect on a certain day and hour, twelve days later. The notice was in the form of a letter, sent by registered mail, directed as follows: "Mr. Philip Vincour, Vedder Avenue, Grantville, Port Richmond, N. Y." The letter reached the proper post office ten days before the cancellation was to take effect, but was never called for or delivered to the insured, although the post office authorities sent him several notices that a registered letter was in the office for delivery. On the same day the insurance company gave notice to the insured it also sent to the state industrial commission notice that under the statute (Workmen's Compensation Law, § 54, subd. 5) it had canceled the policy. Some months later an accident occurred by which an employee was fatally injured. Up to that time no premium had been paid, but three days later the insured sent a check to the insurance company which it retained and applied towards the premium due at the time the policy was canceled, leaving a small balance for which a bill was sent to the insured, asking for payment and informing him that the policy was canceled for non-payment of premium. Held, that the industrial commission had jurisdiction to determine whether the policy had been canceled, but that it erred in deciding that the attempt by the insurance company to cancel the policy was ineffectual because Vinocour was written "Vincour" and Granitville "Grantville." The fact that after the cancellation the company sent its representative to the insured's place of business to check up his payrolls for the purpose of ascertaining the exact amount of premium due when the policy was canceled, does not stop the company. Nor is the fact that the company accepted part of the premium after the accident of any importance, since the insured was only paying a part of what he owed when the cancellation took place. *Matter of Skoczlois v. Vincour.*

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7. When superintendent of apartment house not entitled to compensation for injuries caused by fall of a radiator which he was moving. The lifting of a radiator to connect it up for heating purposes is not heating engineering nor the installation and covering of pipes or boilers within the meaning of group 42 of section 2 of the Workmen's Compensation Law (Cons. Laws, chap. 67), as it existed January, 1916, and hence the superintendent and general repairman of an apartment house injured by the fall of a radiator which he was moving from a storeroom to an apartment, is not entitled to compensation for such injury occurring before that date. *Matter of Kammer v. Hawk.*

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8. Meaning and application of term "employee" in section 3 of law as amended by chapter 622 of Laws of 1916 — When bricklayer doing repair work for printing company whose business is hazardous under the law is entitled to compensation for injury received while engaged in repairing its plant. The amendment to the Workmen's Compensation Law by chapter 622 of the Laws of 1916 was intended to and does embrace an additional class of employees, viz., those in the service of an employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment. A bricklayer, employed to make repairs to the plant of a company engaged in the business of lithographing and printing, classified as hazardous in group 40 of section 2 of the law, is an "employee"

WORKMEN'S COMPENSATION — *Continued.*

within the terms of the law and is entitled to compensation for injuries resulting from the fall of a scaffold upon which he stood while engaged in the work for which he was employed. The fact that he was employed in bricklaying, which was not carried on for pecuniary gain by the company, does not preclude an award to him since his employment was incidental and requisite to the business carried on by his employer. *Matter of Dose v. Moehle Lith. Co.*

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9. *When industrial commission must determine nature of employment, whether pertaining to intrastate or interstate commerce.* Where an employee of a railroad company engaged in both intrastate and interstate commerce died from ivy poisoning contracted while working for the company, and there was some evidence tending to show that the deceased was engaged in work pertaining to interstate commerce, the state industrial commission should pass upon the evidence and determine the nature of such employment, and an award without any determination or finding thereto should be reversed and a new hearing ordered. *Matter of Plass v. Central New England R. R. Co.*

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10. *Forestry and logging for pecuniary gain.* Where the owner of a large tract of woodland cuts and sells the lumber upon it regularly, although that work may be incidental to his main business, he is engaged in forestry and logging for pecuniary gain within the definition of the Workmen's Compensation Law. *Matter of Uhl v. Hartwood Club.*

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See Matter of Sloate v. Rochester Taxicab Co. (Mem.), 491; *Matter of Hellman v. Manning S. P. Co.* (Mem.), 492; *Matter of Markell v. Green F. S. Co.* (Mem.), 493; *Matter of Peake* (Mem.), 496; *Matter of Howard* (Mem.), 605; *Matter of Banks* (Mem.), 606; *Matter of Kucharuk* (Mem.), 607; *Woods v. Tupper Lake Chemical Co.* (Mem.), 660.

WORKMEN'S COMPENSATION LAW.

Common-law action for negligence — when cause of action therein not barred by Workmen's Compensation Law.

See NEGLIGENCE, 1.

Death of night watchman employed by corporation engaged in hazardous occupation — when widow of deceased watchman entitled to compensation although there is no evidence showing how death of watchman was caused.

See WORKMEN'S COMPENSATION, 1.

Superintendent of apartment house injured by fall from stepladder while making ordinary repairs not entitled to compensation.

See WORKMEN'S COMPENSATION, 2.

The president and principal executive officer of a corporation, engaged in a hazardous occupation, not an "employee" entitled, under the statute, to compensation for injuries received while assisting other employees in performing manual labor.

See WORKMEN'S COMPENSATION, 3.

Industrial commission must pass upon nature of employment of injured employee if it is contended and shown by any evidence that he was employed in interstate, instead of intrastate, commerce.

See WORKMEN'S COMPENSATION, 4.

WORKMEN'S COMPENSATION LAW — *Continued.*

Workman having a general and special employer — when person injured may look to either or both for compensation.

See WORKMEN'S COMPENSATION, 5.

Jurisdiction of state industrial commission to determine whether employers' liability policy has been duly canceled by insurance company before an accident to an employee.

See WORKMEN'S COMPENSATION, 6.

When superintendent of apartment house not entitled to compensation for injuries caused by fall of a radiator which he was moving.

See WORKMEN'S COMPENSATION, 7.

Meaning and application of term "employee" in section 3 of law as amended by chapter 622 of Laws of 1916 — when bricklayer doing repair work for printing company whose business is hazardous under the law is entitled to compensation for injury received while engaged in repairing its plant.

See WORKMEN'S COMPENSATION, 8.

TABULAR LIST OF OPINIONS.

HISCOCK, Ch. J.

STATUTORY CONSTRUCTION.

Part of a statute should not be construed by itself, but in connection with the context, and, if practicable, with the origin and purpose of the statute; Mechanics' liens; Requirement that assignment of moneys due on a contract should be filed in the proper county clerk's office; What creditors may not invoke such provision.

Edison Electric Illuminating Co. v. Frick Co., 1, 3.

WORKMEN'S COMPENSATION LAW.

State industrial commission must pass upon nature of employment of injured employee if it is contended and shown by any evidence that he was employed in interstate, instead of intrastate, commerce.

Matter of Saxon v. Erie R. R. Co., 179, 180.

EMINENT DOMAIN.

Constitutional law; When act granting lands under water to upland owners invalid because lacking a two-thirds vote; Act attempting to ratify and confirm such grants invalid because embracing subjects not expressed in title; When act granting right to fill in lands under water gives an inchoate and vested right of which grantee cannot be deprived without compensation; When part of act giving such rights is valid under Constitution so that part may be upheld although the remainder be rejected as invalid; Awards to such upland owners examined and held to be incorrect; Basis of award pointed out.

First Construction Co. v. State of New York, 295, 302.

CRIMES.

Statutes relating to suspension of sentence and probation construed; Revocation of probation and imposition of sentence within two years from date of probation.

People ex rel. Valiant v. Patton, 409, 410.

STOCKBROKERS.

Sale of stocks carried on margin; When sold without reasonable notice to customer, such sale constitutes a conversion; Action by stockbrokers to recover sum claimed to be due from customer; When customer may interpose claim for value of his stocks purchased on margins and sold by parties to whom plaintiff had hypothecated them as collateral.

Mayer v. Monzo, 442, 444.

CHASE, J.**WORKMEN'S COMPENSATION LAW.**

Superintendent of apartment house injured by fall from stepladder while making ordinary repairs not entitled to compensation.

Matter of Schmidt v. Berger, 26, 27.

MURDER.

When evidence of identification of defendant as a person who committed the crime incredible as a matter of law; Erroneous charge of court as to effect of evidence of former identification; Motive of crime; Erroneous charge by court that motive should not be considered by jury.

People v. Seppi, 62, 64.

CONSERVATION LAW.

Violation of provisions thereof forbidding the selling of game out of season; When serving of partridges as part of meal furnished by a hotelkeeper constituted violation of such provisions.

People v. Clair, 108, 109.

DECEDENT'S ESTATE.

Legal community under the law of France; Establishment; Domicile; Election and estoppel applicable to property rights governed by French Code; When widow estopped from claiming legal community in her husband's estate.

Matter of James, 242, 248.

APPEAL.

Erroneous appeal to Appellate Division from a judgment entered on its own order.

Silverstein v. Standard Acc. Ins. Co., 332, 333.

LABOR UNIONS.

Injunction; Right of carpenters' brotherhood or union to refuse to use woodwork made by non-union manufacturers; When the sending by representatives of such union of notices to members of the union and to building contractors not to use such wood-work is not illegal; Injunctions will not be granted to restrain such acts where there are no findings of malice or intent to injure the good will or business of the plaintiffs or non-union manufacturers.

Bossert v. Dhuy, 342, 350.

EMINENT DOMAIN.

Costs; Condemnation of land for a public highway; Damages for loss of water from well caused by construction of highway; Right to grant costs in such proceeding to non-resident owner of land is not taken away by section 154 of Highway Law as amended by chapter 497 of Laws of 1915, but an extra allowance may not be granted.

County of Erie v. Fridenberg, 389, 391.

EVIDENCE.

Witness; Construction and application of section 834 of Code of Civil Procedure; Action on life insurance policy; When plaintiff in proof of death of insured refers to death certificate of a hospital physician and agrees that it shall be part of the proofs of death, such certificate is admissible in evidence upon the trial and the testimony of the attending physician is not incompetent under section 834.

Klein v. Prudential Ins. Co., 449, 451.

COLLIN, J.

JUDICIAL SALE.

Cannot be attacked upon the ground of a subsequent change in interpretation of law.

Morris v. Henry, 96, 97.

INTEREST.

In absence of an interdicting statute parties may agree that a rate of interest, exceeding the legal rate, shall be paid; Agreement to pay interest at a certain rate before a loan is due and a greater rate thereafter is an agreement to pay interest not a penalty; Agree-

ment by a corporation to pay interest in excess of legal rate is not usurious, and the guarantor of such contract is liable therein.

Union Estates Co. v. Adlon Construction Co., 183, 185.

REAL PROPERTY.

Decedent's estate; Proceeding under Real Property Law (Cons. Laws, ch. 50, §§ 105, 107) for sale of trust property by trustee thereof; Power of court under the statute to order sale of estates in remainder; When order directing such sale authorized and should be sustained.

Matter of O'Donnell, 197, 199.

MASTER AND SERVANT.

Negligence; Proximate cause of accident; When master not liable for injury to employee from fall of cases of beer piled in tiers on floor where he was working. Schmidt v. Michael Brewing Co., 228, 229.

COUNTY CLERKS.

Fees; Clerk of Erie county whose salary, fixed by statute, constitutes the whole compensation to be paid to him is not entitled to any part of fees payable to county clerks under Federal statutes for services in naturalization proceedings.

Price v. County of Erie, 260, 262.

APPEAL.

Action for deceit and false representations; Construction of statement in order of the Appellate Division that "the facts have been examined;" Conflict of statements in direct examination and cross-examination for the jury to determine; Facts examined in action for deceit and held that it was error to reverse judgment entered on verdict of a jury.

Ochs v. Woods, 335, 336.

Provision of statute (Code Civ. Pro. § 190, amd. L. 1917, ch. 290) authorizing appeal to Court of Appeals when constitutional question is involved; Construction of statute (County Law, § 240, subds. 16, 18) that costs and expenses of county officer removed by governor are not county charges, not appealable.

People ex rel. Moss v. Supervisors, 367, 368.

WORKMEN'S COMPENSATION LAW.

When industrial commission must determine nature of employment, whether pertaining to intrastate or interstate commerce.

Matter of Plass v. Central N. E. Ry. Co., 472, 473.

NEGLIGENCE.

Workman injured by cause plainly visible; When he cannot recover on ground that defendant should have taken precautions to prevent accident.

McLean v. Studebaker Brothers Co., 475, 476.

CUDDEBACK, J.**APPEAL.**

Judgment or order on appeal to Appellate Division; Power of Appellate Division to review the facts and render a new final judgment in cases of contract and in tort cases; When Appellate Division has the power to reduce the verdict and grant judgment for a smaller amount.

Herrman v. U. S. Trust Co., 143, 145.

PUBLIC OFFICERS.

Repayment of costs and expenses incurred by public officer in successfully defending himself against charges of misconduct; Constitutionality of the statute (County Law, § 240, subd. 16) providing therefor.

Gavin v. Board of Supervisors, 222, 225.

MASTER AND SERVANT.

Scaffold; Negligence; Injury to plaintiff by fall of platform or scaffold; Facts examined and held that structure which fell was a scaffold within the meaning of the authorities.

Storrier v. Mosier & Summers, 237, 238.

PHYSICIANS.

Practice of healing according to "the religious tenets of a church;" Trial of such a practitioner indicted for practicing medicine without a license; Erroneous exclusion of evidence and charge to jury. (Dis. op.)

People v. Vogelgesang, 290, 294.

HOGAN, J.**MASTER AND SERVANT.**

Negligence; Pleading; Demurrer; Common-law action for negligence; When cause of action therein not barred by Workmen's Compensation Law.

Nilsen v. American Bridge Co., 12, 13.

WORKMEN'S COMPENSATION LAW.

Death of night watchman employed by corporation engaged in hazardous occupation; When widow of deceased watchman entitled to compensation although there is no evidence showing how death of watchman was caused.

Matter of Fogarty v. Nat. Biscuit Co., 20, 22.

WATER AND WATERCOURSES.

Action to restrain alleged trespass upon lands and waters; Record examined and held that action cannot be maintained.

Whitehall W. P. Co. v. Atlantic, G. & P. Co., 42, 43.

INSURANCE.

Motor vehicles; When agreement by owners to accept repairs to automobile injured by fire a bar to an action on insurance policy for total loss of car.

Gaffey v. St. Paul F. & M. Ins. Co., 113, 115.

INSURANCE (FIRE).

Cancellation of policy; When notice of cancellation of fire insurance policy given by insured and received by insurer effective, although insurer took no action with reference thereto until after loss by fire; Construction and application of section 122 of Insurance Law (Cons. Laws, ch. 28) relating to cancellation of policies of fire insurance.

Gately-Haire Co. v. Niagara Fire Ins. Co., 162, 164.

WORKMEN'S COMPENSATION LAW.

Meaning and application of term "employee" in section 3 of law as amended by chapter 622 of Laws of 1916; When bricklayer doing repair work for printing company whose business is hazardous under the law is entitled to compensation for injury received while engaged in repairing its plant.

Matter of Dose v. Moehle Lithographic Co., 401, 403.

CARDOZO, J.

SALE.

Vendor and vendee; Loss of goods shipped by express; Failure of vendor to state value of goods; When vendor cannot compel buyer to pay for goods shipped to take place of goods lost.

Miller v. Harvey, 54, 55.

ATTORNEY AT LAW.

Proceedings for disbarment of an attorney; Such proceeding not a criminal prosecution for the imposition of a penalty or forfeiture; Attorney not immune from disbarment because proceeding therefor is based upon testimony on a trial in substance confessing the acts for which he is liable to disbarment; Constitutional provision that no person shall be compelled to testify against himself not applicable in such proceeding.

Matter of Rouss, 81, 83.

SUBROGATION.

Right thereto does not accrue until whole debt has been discharged by person seeking to be subrogated.

McGrath v. Carnegie Trust Co., 92, 93.

MECHANICS' LIENS.

Agreement by landlord to contribute specified sum of cost of improvements being made to leased premises by tenant thereof; Failure of tenant to comply with lease and conditions of agreement; Extent to which landlord is liable upon mechanics' liens for work done in compliance with agreement.

McNulty Bros. v. Offerman, 98, 101.

SALE.

Delivery of goods; Refusal of purchaser to accept goods until delivered at factory of purchaser and inspection thereat; Vendor cannot maintain action for purchaser's breach of contract of sale when tender is accompanied by a condition.

Rubber Trading Co. v. Manhattan R. Mfg. Co., 120, 122.

PLEDGE.

Corporation; When pledge of rental of apartment house, owned by corporation, as security for loan, the proceeds of which were used for the benefit of the corporation, valid.

Barkin Construction Co. v. Goodman, 156, 158.

DAMAGES.

Injunction; Liability of municipal corporation for damages caused by injunction obtained by municipality and thereafter vacated by the courts; Contents of the order granting the injunction.

City of Yonkers v. Federal S. R. Co., 206, 207.

PHYSICIANS.

Practice of medicine without a license; A practitioner, who prescribes and uses medicines for which he receives pay, not exempt from procuring a license as one engaged in practicing "the religious tenets" of his church.

People v. Vogelgesang, 290, 291.

LANDLORD AND TENANT.

Action for rent; Lease of premises which included vault under sidewalk; When exclusion of tenant from such vault by municipal authorities is partial eviction of tenant and constitutes defense in action for rent.

Fifth Avenue Building Co. v. Kernochan, 370, 372.

WILL.

Trust estate for benefit of testator's daughter and her children; Will construed and held that, the daughter and children being dead, the remainder had vested in the children and passed to their father.

Matter of Osman v. Von Roemer, 381, 384.

HUSBAND AND WIFE.

Action to recover from husband value of services of attorney for wife in actions for divorce and separation in excess of costs allowed and for moneys advanced by attorney for support of wife while alimony was unpaid; Attorney not entitled to lien for services, but has a lien for money loaned to the wife upon the unpaid alimony and fine in contempt proceedings.

Turner v. Woolworth, 425, 427.

MARRIAGE SETTLEMENTS.

Consideration; Agreement between father and prospective husband of his daughter to pay daughter certain sum annually; When daughter, although not a party to the contract, may enforce contract and recover unpaid installment.

De Cicco v. Schweizer, 431, 432.

POUND, J.**TRANSFER TAX.**

Personal property owned by husband and wife as joint tenants; Upon death of husband his undivided half interest therein passes to his wife and is subject to a transfer tax as if it had been bequeathed by will; The undivided half interest of the wife not taxable.

Matter of McKelway, 15, 17.

WORKMEN'S COMPENSATION LAW.

The president and principal executive officer of a corporation, engaged in a hazardous occupation, not an "employee" entitled under the statute to compensation for injuries received while assisting other employees in performing manual labor.

Matter of Bowne v. Bowne Co., 28, 30.

TRIAL.

When verdict may be directed or complaint dismissed; Master and servant; Action for wrongful discharge; When facts do not justify discharge; Erroneous reversal by Appellate Division of judgment for plaintiff rendered upon the verdict of a jury; Bad motive or ignorance of adequate reason immaterial.

Getty v. Williams Silver Co., 34, 36.

Motion to dismiss complaint for failure to state a cause of action; When sufficiently definite, without pointing out the particular defect relied on.

Troy Automobile Exchange v. Home Ins. Co., 58, 60.

MASTER AND SERVANT.

Workman having a general and special employer; When person injured may look to either or both for compensation.

Matter of De Noyer v. Cavanaugh, 273, 274.

When master not liable for alleged incompetence of servant.

Barber v. Smeallie, 407, 408.

CONSTITUTIONAL LAW.

Coroner; New York (City of); Statute abolishing office of coroner in Greater New York not in conflict with State Constitution.

Matter of Senior v. Boyle, 414, 416.

APPEAL.

Appellate Division may not base a finding upon the conclusion that if proper evidence had been received it would have been incredible because in the judgment of the court the witnesses were discredited by the history of the case and their conduct in it.
Matter of Reed, 585, 586.

McLAUGHLIN, J.

STATUTORY CONSTRUCTION.

Part of a statute should not be construed by itself, but in connection with the context; Mechanics' liens; Requirement that assignment of moneys due on a contract should be filed in the proper county clerk's office; When assignments are not filed as so required they are invalid and unenforceable. (Dis. op.)

Edison Electric Illuminating Co. v. Frick Co., 1, 9.

LIQUOR TAX CERTIFICATE.

Assignment of certificate; Abandonment of premises for which such certificate was granted and application to have certificate transferred to other premises; When such transfer improperly denied because certificate for premises abandoned had been issued to a new tenant thereof.

Citizens Brewing Corp. v. Lighthall, 71, 74.

CONTRACT.

Real property; Action to set aside deed of farm from plaintiff to his nephew, made in consideration of the latter's promise to support and care for plaintiff during life; Partial breach of such contract by nephew; Duties and obligations of grantee; Grantor entitled to lien upon premises.

Kinney v. Kinney, 133, 135.

INSURANCE (FIRE).

Cancellation of policy; When notice of cancellation of fire insurance policy given by insured and received by insurer effective, although insurer took no action with reference thereto until after loss by fire; Construction and application of section 122 of Insurance Law (Cons. Laws, ch. 28) relating to cancellation of policies of fire insurance. (Con. op.)

Gately-Haire Co. v. Niagara Fire Ins. Co., 162, 174.

MASTER AND SERVANT.

Scaffold; Negligence; Injury to plaintiff by fall of platform or scaffold; Facts examined and held that structure which fell was a scaffold within the meaning of the authorities. (Con. op.)

Storrier v. Mosier & Summers, 237, 241.

WORKMEN'S COMPENSATION LAW.

Insurance; Cancellation of policy covering liability of an employer for accidents to his employees; Jurisdiction of state industrial commission to determine whether employer's liability policy has been duly canceled by insurance company before an accident to an employee; Erroneous decision by commission that notice of cancellation was ineffectual because name and post office of insured were misspelled.

Matter of Skoczlois v. Vinocour, 276, 279.

CIVIL SERVICE.

Appeal; Proceeding to reinstate civil service employee in position from which he had been removed without an opportunity of making an explanation; When decision therein presents only question of law and is appealable to this court; Removal of a deputy tax commissioner of New York city violation of the city charter.

People ex rel. Van Tine v. Purdy, 396, 398.

COURT OF CLAIMS.

Jurisdiction; Notice of intention to file claim must be given pursuant to statute (Code Civ. Pro. § 264).

Buckles v. State of New York, 418, 419.

SALE.

What constitutes a purchaser's acceptance of goods shipped to him in pursuance of a contract of sale; What purchaser must do to reject goods if they do not conform to the contract; When question of acceptance by purchaser one of fact to be determined by a jury.

White v. Schweitzer, 461, 463.

CRANE, J.

UNFAIR COMPETITION IN TRADE.

Photographer may maintain action to restrain competitor from selling reproductions of plaintiff's original photographs, using plaintiff's name thereon.

White Studio v. Dreyfoos, 46, 48.

REPLEVIN.

Gift; Action to recover possession of property claimed by plaintiff as a gift from her deceased husband; Erroneous dismissal of complaint by Appellate Division; Credibility of witnesses question for jury.

Coutant v. Mason, 49, 51.

WILL.

Gift of stock held by testator in manufacturing corporation; Provisions of will examined and held that it was the intention of testator to give to the legatees named the specific shares of stock held by him in the manufacturing corporation named; that such legacies were not general, and that the dividends accrued on such stock should be paid to the specific legatees.

Matter of Security Trust Co., 213, 216.

EMINENT DOMAIN.

Constitutional law; When act granting lands under water to upland owners invalid because lacking a two-thirds vote rendered valid by subsequent act ratifying and confirming such grant; When act granting right to fill in lands under water gives vested rights of which grantees cannot be deprived without compensation; Awards to such upland owners examined and held to be correct; Basis of award pointed out.
(Dis. op.)

First Construction Co. v. State of New York, 295, 325.

WORKMEN'S COMPENSATION LAW.

When superintendent of apartment house not entitled to compensation for injuries caused by fall of a radiator which he was moving.

Matter of Kammer v. Hawk, 378, 379.

MARRIAGE SETTLEMENTS.

Consideration; Agreement between father and prospective husband of his daughter to pay daughter certain

sum annually; When daughter, although not a party to the contract, may enforce contract and recover unpaid installment. (Con. op.)

De Cicco v. Schweizer, 431, 439.

EVIDENCE.

Witness; Section 834 of Code of Civil Procedure; Action on life insurance policy; When testimony of attending physician, although incompetent under section 834, is harmless because of admissions by plaintiff. (Con. op.)

Klein v. Prudential Ins. Co., 449, 455.

WILL.

Testamentary trust; An ulterior limitation, although invalid, will not be allowed to invalidate the primary provision, but will be cut off if the trust is not an entirety; Provisions of will creating trust construed.

Matter of Colegrove, 455, 459.

NEGLIGENCE.

Action to recover from landlord sum paid by plaintiff to estate of employee killed by falling from an elevator in landlord's building in which plaintiff was a tenant; Facts examined and held that plaintiff's complaint should not have been dismissed and that question of fact should have been submitted to the jury. (Dis. op.)

Larkin Co. v. Terminal Warehouse Co., 707, 708.

ANDREWS, J.

NEGLIGENCE.

Person struck by approaching trolley car while crossing a street; Duty to look for and see such car when there are no obstructions to the view.

Weigand v. United Traction Co., 39, 40.

NEW YORK (CITY OF).

Street opening proceedings; Provisions of charter (L. 1901, ch. 466, section 992, amd. by L. 1910, ch. 548) that abutting owners who cede lands from front of lot to center of street without compensation shall not be chargeable with any expense of opening the street except their proportion of damages for buildings taken or injured by the changes made in opening the street.

Matter of City of New York (Tibbett Ave.), 127, 129.

APPEAL.

When Appellate Division reverses or modifies judgment of Trial Term on the facts, it must make findings necessary to support the judgment it orders; Court of Appeals may review without exceptions; Estoppel; Easements; When facts insufficient to show that owner of easement is estopped from maintaining action to restrain obstruction to easement; When right of way in city may be covered if easement is not injured.

Andrews v. Cohen, 148, 152.

WILL.

Erroneous probate of will in this state upon theory that it had been admitted to probate in province of Quebec; Invalidity of probate of such will because probate in province of Quebec failed to comply with requirements of Code of Civil Procedure and will was not properly authenticated.

Matter of Connell, 190, 193.

PUBLIC OFFICERS.

Bonds given by official having custody of village funds; Liability upon general bond not affected by fact that another bond was given for the specific fund for the loss of which recovery is sought.

Village of Bath v. McBride, 231, 233.

WILL.

Provisions of will, giving to testator's wife a life estate with remainder over if she remarries, construed and held that the gifts of remainder are equally conditioned upon either the death or remarriage of the widow.

Matter of Schriever, 268, 270.

STREETS.

New York (city of); Change of grade; When erection of viaduct in and above a street constitutes a change of grade for which an abutting owner may recover damages.

People ex rel. Crane v. Ormond, 283, 285.

COUNTERCLAIM.

When surety cannot interpose cause of action, existing in favor of his principal, as a defense or counterclaim.

Ettlinger v. National Surety Co., 467, 468.

PER CURIAM.

TAX.

When certiorari to review assessment obtained for taxpayer by a corporation should not be dismissed on ground that the corporation was prohibited from practicing law.

People ex rel. Floersheimer v. Purdy, 481, 482.

INSURANCE.

Commissions; Action by insurance broker to recover commissions on policies issued in place of those secured by plaintiff which were canceled by insured; Judgment dismissing complaint sustained.

Degnan v. General Acc., F. & L. Assur. Corp., Ltd., 484, 485.

JUDGMENT.

Findings of referee held inconsistent and judgment modified.

Barcalo Manufg. Co. v. Maldonado & Co., 499.

APPEAL.

Appellate Division may resettle an order made by it although an appeal from such be pending in the Court of Appeals.

Jaffe v. Sonntag, 572.

WORKMEN'S COMPENSATION LAW.

Forestry and logging for pecuniary gain.

Matter of Uhl, 588, 589.

VENDOR AND PURCHASER.

When inequitable to decree specific performance of contract for purchase of real property.

Anderson v. Steinway & Sons, 639, 640.

CONSTITUTIONAL LAW.

Court of Appeals has no power to extend meaning of Constitution; Queens county; Office of county clerk not required by Constitution to be filled at election in year 1917.

Matter of Becker v. Boyle, 681, 682.

ELECTION LAW.

Section 122 constitutional; Municipal Court district in borough of Brooklyn a political subdivision.

Matter of Richards; Matter of Glore, 684, 685.

STATE.

Filing of claim not equivalent to filing of notice of intention to file claim.

Butterfield v. State of N. Y., 701, 702.

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